Supreme Court of the United States

OCTOBER TERM, 1915

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

APPELLANT'S REPLY BRIEF.

STATEMENT OF POINTS TO BE DISCUSSED.

By way of reply to the appellee's brief we desire merely (1) to correct certain misstatements of fact and of our position on the law which, undoubtedly through inadvertence, have crept into the appellee's brief; (2) to comment briefly on the discussion therein of the question whether the appellee applied in 1884 for the "location" and "specifications" which Pub. Stats., Chap. 109, Sec. 103, required it to obtain before constructing its line; and (3) to state briefly our objection to the addition suggested on page 99 of the appellee's brief to the change in the final decree proposed by the appellant on page 57 of its brief.

ARGUMENT.

I.

Misstatements of Fact.

(1) On page 15 of the appellee's brief appears the statement, "In neither case was the name of the state of incorporation a part of the corporate name," meaning that the words "of New York" and "of Massachusetts" were not part of the corporate names of the companies that did business in New York and in Massachusetts respectively. And in the paragraph beginning at the bottom of page 81 and ending on page 8[illegible] is statement is repeated in somewhat different words accompanied by certain additional statements concerning the business relations of the New England Telegraph Company of New York and the New England Telegraph Company of Massachusetts.

There is, we think, nothing whatever in the evidence or in the findings of Judge Dodge, or in any part of the record, to warrant these statements. The record appears to show the precise contrary. The name that the appellee chose to litigate under in its bill is the New England Telegraph Company of Massachusetts. In the fifth paragraph of its answer to the cross bill (Rec. p. 15) occurs this language:

> "The defendant admits that the New England Telegraph Company of Massachusetts is a corporation organized for private purposes . . ." etc.

The sixth paragraph of the appellee's answer to the cross bill "admits [Rec. p. 16] the allegations of the sixth paragraph of the cross bill contained." The material allegations of the sixth paragraph of the appellant's cross bill thus admitted are (Rec. p. 13): "that the plaintiff, the New England Telegraph Company of Massachusetts, was organ-

ized under the general laws of Massachusetts " . . . etc.; and that it made a return in 1905 to the commissioner of corporations concerning the ownership of its capital stock.

Charles P. Bruch, the appellee's treasurer (Rec. p. 28), testified "that there was another Telegraph Company *named* the New England Telegraph Company of New York . . ."; that "so far as the public was concerned, the New England Telegraph Company of Massachusetts did its business . . ." etc.; "and so far as the relations of the Company with the towns and state were concerned, it had always used the name of the New England Telegraph Company of Massachusetts in all formal transactions; that its returns to the state were made in that name . . ." etc. (Rec. p. 29).

Edward B. Pillsbury, the appellee's superintendent, wherever he refers in his testimony (pp. 30–36) to the two companies gives in each case the name of the state as a part of the corporate name, and states (p. 31) "that what he really meant to sign was 'The New England Telegraph Company of Massachusetts,' " which is placed in quotation marks in the record. It is stated as an agreed fact (Rec. p. 39) that the appellee "and the New England Telegraph Company of New York have duly accepted the provisions of the Telegraph Act of Congress." It is also stated (Rec. p. 45) as an agreed fact "that the New England Telegraph Company of Massachusetts was duly incorporated under the laws of Massachusetts on April 7, 1884."

These references are sufficient to show that in its articles of incorporation, its returns to the Massachusetts commissioner of corporations, and its other dealings with the Massachusetts authorities, one of these companies uses the words "of Massachusetts" as part of its corporate name; that both companies use the names of the respective states as part of their corporate names in their dealings with the United States Government; and that the Treasurer and Superintendent of the appellee use the names of the respec-

tive states as part of the corporate names of the respective companies whenever they have occasion either to refer to the companies or to do business in the name of the appellee. There is nothing whatever in the record tending in any degree to offset the effect of this evidence and of these agreed facts. And Judge Dodge says nothing in his opinion giving the least support to the appellee's statement that the words "of Massachusetts" and "of New York" are not parts of the corporate names of the respective companies. We therefore submit that the appellee ought not to say in its brief that "in neither case was the name of the state of incorporation a part of the corporate name." The elaboration of this statement on page 82 of the appellee's brief is equally unwarranted. It is there said:

> "While in its relation with the public the Massachusetts company uses the name Postal Telegraph Cable Company in all formal transactions, and in relation to the construction, operation, and maintenance of its line, and in its relations to the state, the Massachusetts company uses its charter name the New England Telegraph Company, and describes itself as of Massachusetts."

For this the appellee cites the testimony of Bruch (p. 29). A reference to his testimony above set forth shows that he did not make the discrimination attributed to him by the appellee. We have discussed this matter fully, not because it is vital or even especially important to our case, for it is not; but because we desire not to run the least risk of an adverse decision based on a mistake of fact.

(2) On page 38 of the appellee's brief occurs the statement:

> "On the other hand if the post roads occupied by the telegraph company were public highways, then if the right to occupy such post roads was not given by the Act of Congress of 1866, the state would have the right to exclude the telegraph company from such

> post roads, *because, as pointed out by the appellant here on pp. 40–44 inclusive of his brief*, any permission given to the telegraph company by the state to occupy such post roads could have been no more than a license and revocable at the pleasure of the state, so that the state would not only have the right of excluding the company from such streets for the purpose of collecting a state tax, but would have the right so to exclude it even arbitrarily." (Italics ours.)

We decidedly object to the words "as pointed out by the appellant here on pp. 40–44 inclusive of his brief," and to the proposition of law thus attributed to the appellant. That proposition of law is not "pointed out" on pages 40–44 of our brief, or elsewhere in our brief, and we decline to be responsible for it. Our position is *not* that the state of Massachusetts, having once as a property owner (the owner of the public easement of travel in said streets) permitted the appellee to occupy said streets, could afterwards, either in its proprietary or in its sovereign or political capacity either arbitrarily or as a penalty for non-payment of taxes, have excluded it from such streets. On pages 40–44 of our original brief referred to by the appellee we were simply endeavoring to establish the proposition that on the undisputed facts in the case, the Commonwealth of Massachusetts had in 1884, under the decisions of this Court, and of the Supreme Court of Massachusetts, a sufficient proprietary interest in these streets to entitle it to prescribe the terms and conditions upon which the *original* occupancy of the streets by the appellee could be made; and that the Act of Congress of July 1, 1866, did not confer a right upon the appellee to occupy the streets in the first instance without complying with the Commonwealth's terms, any more than it conferred upon the appellee a right to run its lines through the front yard of a citizen of Massachusetts without first coming to terms with him.

The point urged in our brief is that in respect of its ownership of the public easement of travel in its highways the Commonwealth of Massachusetts stands toward the appellee, and companies like the appellee, precisely as a private landowner stands toward them; and that as against the national government the state is in as true a sense the owner of the public easement of travel in its highways as it is in respect of the ownership of its state house grounds, or of the highways constructed by it directly, to the soil of which it has title in fee simple. We do not contend that having once permitted the appellee to make a first and original occupancy of its highways, the Commonwealth could afterwards exclude it therefrom either arbitrarily or as a penalty for non-payment of taxes. The distinction is a clear one, and is, we believe, the one intended by this Court in the opinions in

Western Union Tel. Co. v. *Richmond*, 224 U. S. 160;

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92;

Western Union Tel. Co. v. *Mass.*, 125 U. S. 530;

and in several other decisions referred to and discussed in our brief.

We add that the appellee appears singularly oblivious to this distinction, not only in the part of his brief here under discussion, but also in its references to the language of the Court in *Western Union Telegraph Co.* v. *Richmond*, supra, in which not only was there nothing to show that the interest of the city of Richmond in its streets was other than that of the Commonwealth of Massachusetts in these streets, namely, the holder as trustee of the easement of public travel; but the contrary is implied in the language of Mr. Justice Holmes, where he says, pages 169–170:

> "The rights of the city to the streets are left a little vague, but the bill assumes that they are such

> as to authorize the charge of a reasonable rental on the principle of *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92. Any license that the city may have granted as owner or representative of the owner of the public easement, or otherwise, may be assumed to have been revoked, and so far as the city's title is infringed by the appellant, nothing appears to limit the city's right to insist upon it as fully as a private owner might. Leaving the question of title on one side, except so far as to note that the appellant does not show one, and that the city has power to admit it to the highways, the other regulations complained of do not violate the appellant's constitutional rights."

Our position is that the most important, if not the only, rights conferred by the Act of Congress of July 1, 1866, upon telegraph companies are, first, the right to be treated alike and without discrimination by the state in respect of the terms of original occupancy of the state's highways; second, the right to be treated without arbitrary discrimination in respect of subsequent police regulation; and, third, the right not to be excluded by the state from its highways after an original legal occupancy. But it does not confer the right upon any telegraph company to occupy the highways of a state in the first instance without complying with the terms imposed by the state upon all telegraph companies which have complied with the Act of Congress. These discriminations seem to have been misunderstood by the appellee in every part of its brief devoted either to the statement and discussion of our position, or to the discussion and analysis of the decisions of this Court. It is unnecessary to take up and refute in detail all the statements in the appellee's long brief on this subject. We rely upon the analysis of the decisions contained in our original brief.

II.

Comments on the appellee's discussion of the question whether before occupying the streets in 1884 it applied for the "location" and "specifications" which Pub. Stats., Chap. 109, Sec. 103, required it to obtain before constructing its line.

The appellee characterizes as "amazing" the assertion on page 11 of the appellant's brief that

> "the evidence, though somewhat conflicting, clearly warrants the conclusion that the reason why no 'location' and 'specifications' were ever granted to this plaintiff was that it never applied for any."

This means, of course, that the appellee did not apply for any before the original occupation of the streets in 1884. On the main point, which is whether the appellee did or did not in 1884, or at any time thereafter, *obtain* any "location" or "specifications," it is said in the appellee's brief (p. 73):

> "The appellee does not dispute this, but although it contended at the hearing that on the evidence such a writing or permit had been given it, it accepts the finding of the District Court to the contrary."

The appellee, however, devotes five pages of its brief to an attempt to prove that in 1884 it made a written application for the "location" and "specifications," which were then refused. The appellant's statement that the appellee did not make an application in 1884 may be amazing; but it is evidently the view entertained by Judge Dodge. He says (Rec. p. 23):

> "As has been stated, the specification in writing provided for by Chap. 122, Sec. 2, Rev. Laws, has been, though applied for, expressly withheld and refused

since 1905"; and "The plaintiff has been *at least since 1905* constantly in the attitude of requesting the town to give the specification." (Italics ours.)

If the appellee believed that it was essential to its case to show that before occupying the streets in 1884 it did everything in its power to comply with the laws of Massachusetts then in force, it was certainly incumbent upon the appellee to prove that fact. It tried to show that it in fact obtained the "location" and "specifications" in 1884; but Judge Dodge found otherwise, and the appellee now accepts the finding and abandons its suggestion of a mutilation of the town records. But although the appellee no longer contends that it obtained any location in 1884, it still adheres to its claim that it applied for one then. Judge Dodge, however, who saw and heard the only two witnesses upon whose testimony the appellee relies, was as incredulous about the existence of an application as about the granting of one. He evidently did not believe the appellee's witness George F. Bartlett (pp. 32–33), and he attached no importance to the interpretation (p. 45) placed by the selectman Aaron Cogswell on cross-examination on the remark made to him long since by Daniel F. Bartlett, the deceased selectman, that "the New England Telegraph Company of New York never had a location in the town"; that the witness asked him if he understood what company he meant, namely, the company then in the town, and Bartlett replied "Yes, he knew what was meant." Cogswell's interpretation of this remark as meaning that the selectmen "had definitely acted on a request and had refused it," appears strained on the face of it, and certainly falls far short of being convincing evidence of the fact that any such request had been made. It is as consistent with the view that the company never applied for a "location" as it is with the view that it applied for one and was refused. And now that the appellee withdraws its claim that the town records have been mutilated, and makes no suggestion

that the records were not properly kept, it would seem that the fact that there is no record of any such application is well-nigh conclusive against the claim that any such application was ever made, either in writing or orally. Certainly the appellee has not sustained the burden of proof on this point.

We continue to rely, therefore, upon the analysis of the testimony contained on pages 11–14 of our original brief, now supplemented by the appellee's concession that the town's records have not been mutilated. Perhaps it would have been more accurate for us to aver that "*One* reason why no 'location' or 'specifications' were ever granted to this plaintiff was that it never applied for any," instead of saying that "*The* reason why no 'location' or 'specifications' were ever granted to this plaintiff was that it never applied for any." In our view, however, the question why the appellee did not obtain any location before constructing its lines in 1884 is of far less consequence than the question whether it did in fact obtain one, *i.e.*, whether it in fact came to terms with the Commonwealth of Massachusetts represented by the selectmen of Essex before it made its original occupation of these streets. If the appellee deems it important to show that the appellee at that time tried to come to terms with the Commonwealth, and failed to do so, then we aver that it has entirely failed to prove that such was the case. But in our view the question is merely collateral, and not essential to the determination of the case. For whether the appellee tried to get a location in 1884 or not, it admittedly did not get one.

III.

Appellant's objections to the addition suggested on page 99 of the appellee's brief to the change in the final decree proposed by the appellant on page 57 of its brief.

We ask no space to reply to the contention that our request for an alteration in the final decree comes too late. It may be frankly conceded that this litigation has been long drawn out. Since the litigation was begun many boards of selectmen have come and gone, the town's original counsel has died, and none of the counsel now representing the town represented it in any of the proceedings in the District Court. But all that can hardly be urged as a reason for perpetuating a final decree which seriously impairs the rights reserved to the Commonwealth of Massachusetts by the Constitution of the United States, if such is the effect of this decree. That such is its effect, even if the appellee's general position in reference to the scope of the Act of Congress of July 1, 1866, is sound, and our position is unsound, we have endeavored to show on pages 57–65 of our original brief, and we find nothing to meet our arguments in the portion of the appellee's brief devoted to this particular matter (pp. 97–99). On the contrary, the appellee's failure to meet some of our arguments at all, and to deal with others in any way except by mere assertion, is so apparent as to suggest that the appellee itself has serious doubts as to the propriety of the final decree. There is nothing to show an *assent* by the Town either to the form or the substance of the final decree. The amendment to the final decree suggested on page 57 of our original brief is:—

> "Provided that nothing herein contained shall be construed to prohibit a reasonable exercise by the board of selectmen of the town of Essex of the regulative powers concerning telegraph lines conferred upon said selectmen as a public board by the laws of the Commonwealth of Massachusetts now or hereafter in force, or any action by the defendant, its officers, agents, and employees, authorized or required by said laws."

The appellee makes no serious objection to this amendment, but suggests that if it should be adopted, the words

"reasonable and valid" should be inserted before the phrase "laws of the Commonwealth of Massachusetts now or hereafter in force." There is no necessity for this amendment. There is no suggestion in the appellee's brief that the present laws of the Commonwealth of Massachusetts are either unreasonable or invalid. What the appellee objects to is the alleged unreasonable action of the board of selectmen under those laws—not the unreasonableness of the laws themselves. It is to be assumed that the laws of Massachusetts will continue to be reasonable and valid, and not in violation of the Constitution of the United States. If laws should be enacted in the future which seem to violate the Constitution of the United States, it will be time enough to test their validity when they are enacted. It certainly is inappropriate to suggest in a decree of a federal court that existing laws not declared to be invalid in the particular decision may nevertheless turn out to be so, and that future laws may be open to the same objection.

We continue to contend on the grounds stated in our original brief that the decree of the District Court should be reversed and a new decree entered dismissing the appellee's bill with costs to the appellant; and that if the bill is not dismissed, the costs of this appeal should be allowed to the appellant by reason of the extreme and unwarranted scope of the final decree.

Respectfully submitted,

WM. G. THOMPSON,
GEORGE E. MEARS,
ROMNEY SPRING,
Counsel for Appellant.

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NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS,
Appellee.

APPELLEE'S REPLY BRIEF.

G. PHILIP WARDNER,
Counsel for Appellee.

L. H. Lane, Law Printer, 221 High Street, Boston.

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APPELLEE'S REPLY BRIEF.

CORRECTION.

The figures 1886 in the ninth line of the heading on page 31 of the appellee's original brief are a misprint and should of course be 1866.

1.

On page 2 of the appellant's reply brief it is stated that the record does not warrant the statements, made by the appellee on pages 15, 81 and 82 of its original brief, that neither in the case of the New England Telegraph Company, a New York corporation, or in the case of the New England Telegraph Company, a Massachusetts corporation, was the name of the State of the incorporation a part of the corporate name.

The appellee does not think that the point is of any materiality, but, whether it is or not, it is true that the

above statements do not appear to be warranted by the record. They crept into the appellee's brief not by intention but by inadvertence, and the appellee regrets that such a mistake should have been made.

2.

a. In

New England Telephone, etc. Co. v. *Boston Terminal Co.*, 182 Mass. 397, and in

Boston Electric Light Co. v. *Boston Terminal Co.*, 184 Mass. 556,

cited on pages 41 and 42 of the appellant's original brief, it was expressly decided that any permission given to a telegraph company by the State of Massachusetts under the statutes involved in the case at bar was nothing more than a license revocable at the pleasure of the State.

The appellant after stating and quoting from *Boston Electric Light Co.* v. *Boston Terminal Company,* 185 Mass. 556, said on page 43 of the appellant's original brief: "Having stated that companies placing wires, conduits, or similar things in public streets do so under a revocable license, he (Chief Justice Knowlton) added, page 570:"

It is submitted therefore that the passage from the appellee's original brief quoted on pages 4 and 5 of the appellant's reply brief is entirely correct.

b. The appellee is entirely willing that the words printed in italics in the quotation on page 5 of the appellant's reply brief should be eliminated from the appellee's original brief, as they are not in any way material to the appellee's argument.

c. The appellant, on pages 5 to 7 of its reply brief, apparently admits that the State of Massachusetts having once, as a property owner, the owner of the public easement of travel in its streets, permitted the appellee to

occupy said streets could not afterward either in its proprietary or in its sovereign or political capacity arbitrarily or as a penalty for non-payment of taxes exclude the appellee from the streets, but the appellant says the State of Massachusetts is entitled to prescribe the terms and conditions upon which the original occupancy of the streets by the appellee could be made. In its original brief the appellant had (on p. 38) said:—

> "The time we submit has come to decide squarely that so far as the original right to occupy the highways of the State is concerned the Act of 1866 has no application and leaves the company no better off than it would be without the statute."

Clearly there is no basis for any such distinction in the Act of Congress, as the same rights are thereby given to telegraph companies to construct as to maintain and operate. Nor do the cases relied upon by the appellant and cited on page 6 of its reply brief warrant any such distinction. In fact, in *Western Union Tel. Co.* v. *Massachusetts* quite the contrary was stated. The court there said:

> "While the State could not interfere by any specific statute to prevent a corporation from placing its line along these postroads, or stop the use of them after they were placed there", etc.

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92,

the court said that the occupation by this Interstate Commerce company of the streets cannot be denied by the city. The passage from *Western Union Tel. Co.* v. *Richmond,* cited on pages 6 and 7 of the appellant's reply brief, is not to be interpreted as meaning that the city whatever the nature of its rights in its streets had not-

withstanding the Act of Congress of 1866 exactly the same rights in relation to the occupation of its streets by telegraph companies as the owner of private property has in relation to the occupation by telegraph companies of private property. In fact, if such were its meaning it would prove too much for the appellant's present purpose for in such case not only would the city have had the right to prevent an original occupation of its streets, but could also have excluded the telegraph company even after it had erected its lines in pursuance of a lawful permit, which the appellant admits the city could not do.

d. The appellant states on page 6 of its reply brief that as against the National Government the State is in as true a sense the owner of the public easement of travel in its highways as it is in respect of the ownership of its State House grounds, or of the highways constructed by it directly, to the soil of which it has title in fee simple.

It is not necessary to determine whether the State can in any proper sense be said to be the owner of the public easement, because, so far as the public highways of Massachusetts are concerned, the easement includes not only the right of travel, but the right to use the highways for the construction and operation of telegraph lines. It will at least be conceded that the State is the guardian of the public easement, and therefore it is its duty not only to protect the easement of travel, but the easement of using the highways for telegraph purposes. All that is left for the State so far as either is concerned is the proper regulation of the use of the highways by the parties entitled to use them, and of course this right of regulation must yield to a paramount right of Congress to regulate the same thing where it becomes necessary or proper in the field of Interstate Commerce and in the administration of the postal system.

e. The appellant states on page 7 of its reply brief that the discrimination made by it between the right of the State to prevent an original entry and the right of the State to exclude after a lawful occupation has been effected was misunderstood by the appellee. The appellee quite understood the discrimination and submits that it has been met by the proposition stated on page 31 of its original brief. If that proposition is sound, then the position of the appellant is not sound.

3.

Pages 8 to 10 of the appellant's reply brief are devoted to an attempt to show that no application was made by the appellee for specifications in 1884.

a. The appellant says that such is evidently the view entertained by Judge Dodge. What Judge Dodge said on the point appears on page 23 of the record and is quoted on pages 8 and 9 of the appellant's reply brief. Judge Dodge says that there was an express refusal since 1905. He could not say that there was an express refusal of the petition of 1902 as that petition was never acted on. (See appellant's original brief, p. 13.) He might well have hesitated about saying that there had been an express refusal of the petition of 1884 because the only evidence of an express refusal came from the appellant's witness Cogswell, who said (Rec. p. 45) that he inferred from what Mr. Bartlett, the former selectman, said that what he meant to say was that they had definitely acted upon a request and had refused it. The words "since 1905" where they first appear do not limit the words "though applied for", but only limit the words "expressly withheld and refused", but even if it were otherwise, it would not follow, because the court found that the specification had been applied for since 1905, and because the court found further on that the plaintiff had been at least since 1905 constantly in the attitude of requesting the town to

give the specifications, that the court is to be taken as having found that there was no application for specifications prior to 1905. Such a construction of the court's decision would be entirely inconsistent with the admitted fact that there was a written application in 1902. (See appellant's original brief, p. 13.)

b. The appellant says on page 9 of his reply brief that the court evidently did not believe the appellee's witness, George F. Bartlett. The appellant apparently bases this idea to some extent on the fact that in the District Court the appellee contended that the selectmen of the Town of Essex did in fact grant a specification in writing and that the appellee suggested a mutilation of the records as a reason why such specification did not appear on record, and that the District Court found against these contentions.

These contentions were based solely on the evidence of Joseph Atchison. (Rec. p. 33.)

The finding of the District Court does not mean necessarily that it disbelieved the evidence of Atchison. It more probably means that the court felt that assuming Atchison's evidence to be true it would not warrant the finding that there had been a mutilation of the records, or that there had been a specification granted. But, however that may be, Atchison gave no evidence whatever on the question as to whether there had been an application for a permit; that evidence came solely from the appellee's witness, Bartlett. (Rec. pp. 32, 33.) And Bartlett gave no evidence whatsoever on the matter of the mutilation of the records. It is absurd to contend that because the court found against the appellee's contention that there had been a mutilation of the records and that specifications had been granted, which contention was based on the evidence of Atchison, that therefore the court must be taken to have found against the appellee's contention

that specifications had been applied for, which contention was based on the evidence of an entirely different witness, Bartlett.

c. The appellant's own witness Cogswell, the chairman of the board of selectmen, stated (Rec. p. 45):

> "That he inferred from what Mr. Bartlett, former selectmen, said that what he meant to say was that they had definitely acted on a request and had refused it."

The appellant finds it necessary to criticize the evidence of its own witness on this point, characterizing the above statement as "strained on the face of it" and as falling "far short of being convincing evidence of the fact that any such request had been made". (See Appellant's reply brief, p. 9.)

The appellee is absolutely unable to understand how it can be said of Cogswell's statement, that "It is as consistent with the view that the company never applied for a location as it is with the view that it applied for one and was refused". Much or little weight may be attached to Cogswell's statement, but surely for what it is worth it does tend to show that an application had been made and had been refused.

d. The appellant says on page 10 of its reply brief that

> "the fact that there is no record of any such application is well nigh conclusive against the claim that any such application was ever made, either in writing or orally".

The trouble with this argument is that it assumes that applications for specifications where they are not acted on are recorded. This does not appear to be the case. The town clerk made an affidavit that the records of the Town

of Essex showed no transactions with the New England Telegraph Company of Massachusetts. (Rec. pp. 50, 51.) The selectmen made an affidavit that there were no records in the year 1884 or in the year 1902 relating to any petition of the New England Telegraph Company. (Rec. p. 52.) There is absolutely no question that an application for specifications was made by the appellee in 1902, which application was never acted on. (Rec. p. 46; Appellant's original brief, p. 13.) It appears, therefore, that no applications for specifications are recorded in the town's books and that at least not all applications for specifications are recorded in the selectmen's books. No inference therefore unfavorable to the appellee can be drawn from the fact that neither in the town's records nor in the selectmen's records is there any record of an application by the appellee in 1884.

It is stated on page 11 of the appellee's reply brief that "The appellee itself has serious doubts as to the propriety of the final decree". The appellee submits that the final decree is proper, but it has nothing to add to what it has said on this point in its original brief.

G. PHILIP WARDNER,
Counsel for Appellee.

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BRIEF FOR THE APPELLEE,
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G. PHILIP WARDNER,
Counsel for Appellee.

L. E. Loud Law Printer, 101 High Street, Boston.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

BRIEF FOR THE APPELLEE,

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court for the District of Massachusetts, sitting in equity, granting an injunction as prayed for in the amended bill of complaint and dismissing a cross-bill. The bill was filed on July 31, 1905, in the Circuit Court of the United States for the District of Massachusetts to enjoin and restrain the Town of Essex in the State of Massachusetts from interfering in any manner whatsoever with the appellee's line of telegraph in said town, or with the location or relocation by the appellee on the roads and highways then occupied by its said line of telegraph in said town, or with the resetting of the poles of said line in said town by the appellee, or with the appellee's making such repairs and changes as were necessary to put said line in a condition of safety and efficiency, or from

in any manner causing or allowing any other person or corporation to interfere with or stop such relocation, resetting, repairs or changes by the appellee.

On July 31, 1905, upon appellee's motion, supported by affidavits, a restraining order was issued, and on September 5, 1905 (Record, p. 7), upon appellee's motion, supported by affidavits, a temporary injunction was issued as prayed for. No motion to dissolve this injunction has been made by the town.

On September 26, 1905, the town filed its answer and a cross-bill praying that the appellee be ordered to take up its poles from the streets of the town and that the company be enjoined from using its poles or wires until it should have obtained a franchise from the selectmen of the town as provided by the laws of the Commonwealth of Massachusetts. On March 28, 1906, a replication was filed by the Town of Essex, and on March 30, 1906, a replication was filed by the New England Telegraph Company.

The cause came on for a hearing on June 23, 1913, and on October 27, 1913, a decree was entered granting a perpetual injunction as prayed for and dismissing the cross-bill. (Record, p. 18.) From this decree the Town of Essex has appealed to this Court.

PLEADINGS.

The bill alleges in substance that the New England Telegraph Company is a Massachusetts corporation authorized by its charter to maintain and operate lines of telegraph in and between various States of the United States, including the State of Massachusetts, and is actually engaged in an interstate and foreign telegraph business; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000 and arises under the constitution and laws of the United States; that

the company duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations of the Act of Congress of the United States entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes", approved July 24, 1866, and amendments thereto; that the company has fully complied with the provisions of said Act of Congress in that it has transmitted to and from the Government of the United States telegraph messages at rates fixed by the Postmaster General of the Government of the United States, and has fully complied in all other respects with said Act of Congress and the obligations thereof; that said Act of Congress of 1866 authorizes the company by reason of said acceptance to construct, maintain and operate its lines of telegraph over and along any of the post roads of the United States, and that by the Act of Congress of March 1, 1884, all public roads and highways kept up and maintained as such are declared to be post roads; that the highways in said Town of Essex upon which the company desires to construct its line of telegraph have been and now are public highways kept up and maintained as such, and are post roads within the meaning of the Acts of Congress as aforesaid; that in 1884 the company constructed a line of telegraph from the City of New York in the State of New York to the Translantic cable station in the Town of Rockport in the Commonwealth of Massachusetts, through the Town of Hamilton, which borders Essex on the west, to a point on the easterly boundary of said Hamilton which was fixed by the action of said town; that the point in the westerly boundary of the City of Gloucester which borders Essex on the east, where the company's line touches said boundary, was fixed by the action of said city; that between the points so as aforesaid fixed by the Town of Hamilton and

the City of Gloucester there are absolutely no other roads or highways whatsoever that can be used as a route for the company's line than those now occupied by it, to wit: from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line; that the company constructed its line as aforesaid through the Town of Essex with the consent and permission of its selectmen and it has remained substantially as so constructed down to the time of the filing of the bill; that said highways are of sufficient width to allow of the construction and operation of the line without inconvenience to the public; that at the present time and for a considerable period prior thereto the company's line in the Town of Essex is and has been in an unsafe condition and dangerous to the public, and liable at any time to become wholly inefficient for the purposes of the company's business, and for these and other like reasons the company's line in said Town of Essex needs relocating on said highways on which it now exists, for the benefit of the abutters and the town, and to meet the present conditions of the company's business; that, therefore, on June 1, 1905, the company for the purpose of relocating its line of telegraph in the Town of Essex on the highways aforesaid filed a petition in writing with the Board of Selectmen of the Town of Essex, praying for a location for its poles and wires, and license to maintain the same in the following named streets and highways of said town, viz., from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions now occupied by the old poles and any changes in the present location to be made under the direction of the Board of Selectmen; that the Board of Selectmen refused this petition and orally declared to the representatives of the company that it was the intention of the town to prevent the

company from maintaining or operating any line of telegraph whatsoever within the limits of said town, and threatened if the company attempted to relocate any of its poles in said highways to prevent the company from so doing; that thereupon the company was obliged by reason thereof and by force to stop said relocation, and did stop such relocation, and by reason thereof has been and still is unable to relocate its said line of telegraph or any portion thereof on the said highways in and through said town; that thereupon the company attempted, without any relocation, in order to put its said line in said town into a safe and efficient condition, to reset certain of its poles, substituting sound poles for rotten poles, in the same places occupied by the old poles, and to restring its wires on said line, and to do other repairs necessary to put the said line into a safe and efficient condition, but, nevertheless, the selectmen of the Town of Essex peremptorily forbade the company from resetting its poles, from substituting sound for rotten poles, or from restringing its wires, or making any repairs whatsoever of any name, nature or description, and threatened to take steps to prevent the company from so doing if it continued in said attempt; that thereupon the company was obliged by reason thereof and by force to stop all repairs, and resetting and restringing, and by reason thereof the company has been and still is unable to repair its line or reset its poles or restring its wires in said town; that the line in said town is in a precarious condition, that there is extreme peril to life and limb and imminent danger of there being a break and interruption in its line of telegraph running so as aforesaid from the City of New York to said cable station in the Town of Rockport; that the company's line within the limits of the Town of Essex forms an important link in the interstate and international telegraph system maintained and operated by the com-

pany; that an interruption and break in said system in the Town of Essex would cause great damage to the company, and might be attended with serious results to many people in the United States, and embarrass the Government of the United States.

The answer (Record, p. 7) denied in substance all of the allegations of the bill except that it averred that a certain line of telegraph was constructed in its streets without authority or permission of the town or any of its duly authorized officers; and except that it admitted that the town through its selectmen notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatever within the limits of said town, and that the selectmen forbade the plaintiff from resetting its poles, from changing the locations of its poles, from restringing its wires or from doing business of any sort in said town on the highways of said town until first a franchise was obtained therefor in accordance with the laws of Massachusetts.

The answer specifically denied that the telegraph company had any rights whatsoever in the streets of the town under the Act of July 24, 1866, and the Act of March 1, 1884, without having first obtained a franchise from the Board of Selectmen in accordance with the Statutes of the Commonwealth of Massachusetts; that Congress had any authority under the Constitution of the United States to grant the plaintiff any rights in the public highways of the town, or that the company had any rights whatsoever on the highways of the Town of Essex, either by grant from Congress, from the General Court of Massachusetts, or from the selectmen of the Town of Essex, or any other legally constituted authority, and asserted that if the appellee had any poles or wires in the streets of the town they were there without right. (Record, pp. 8 to 11.)

By its cross-bill (Record, p. 12) the town alleged that

the Government of the United States, or any body corporate or any person whatsoever, had no interest in the highways in question except the abutters, who owned the fee subject to the right of the public to pass and repass thereon; that before a telegraph company obtains any rights in the streets of any of the municipalities of Massachusetts it must obtain the consent of the selectmen of the town in accordance with the Statutes of Massachusetts; that in 1884 the plaintiff, without obtaining the consent of the selectmen of the Town of Essex, and without obtaining any right whatsoever in the defendant's streets, erected wires and poles in streets specified in the bill and thereafter maintained the same against the objection of the defendant and its selectmen; that since the bringing of the bill the defendant requested the plaintiff to forthwith remove its poles and wires from said streets, but that defendant refused to do so; that defendant through its selectmen did everything in their power to induce the plaintiff to remove its poles and wires from defendant's streets, but plaintiff refused and still refuses and continued to trespass on defendant's highways without right and without authority and continued so to do.

The prayer of the cross-bill was that the plaintiff be ordered to forthwith take up its poles from said streets, and that it be enjoined from using said poles and wires for its business purposes until it had first obtained a franchise from the Board of Selectmen of the defendant as provided by the laws of Massachusetts.

The plaintiff's answer to the cross-bill denied all of these allegations except the allegation that the town had tried to get the plaintiff to take its poles and wires from the defendant's streets.

STATEMENT OF FACTS.

The appellee is a Massachusetts corporation incorporated April 7, 1884, "for the purpose of constructing lines of aerial or underground wires of telegraph both within and without the limits of said Commonwealth and the owning, constructing, maintaining and operating lines of aerial or underground electric telegraph, both within and without the limits of said Commonwealth and the owning of interests in such lines". Its capital stock is $30,000. (Record, p. 19.)

The Town of Essex is a municipal corporation of the Commonwealth of Massachusetts. (Record, p. 8, paragraph 2.)

The appellee's line in the Town of Essex forms part of a line constructed by the company through Massachusetts from the Rhode Island line to Rockport, crossing on its way through various Massachusetts towns and cities. At Rockport it connects with a line of telegraph cable to Europe. At the Rhode Island line it connects directly or intermediately with telegraph lines constructed by telegraph companies in alliance with the appellee, affording telegraphic communication to points through the United States. It was constructed to be and it has been since used as part of a system of lines in connection, affording telegraphic communication between these United States points and Europe, as well as between points on the connected lines within the United States. The business done over this line is the handling of telegrams for the public, the handling of cablegrams to and from the cable terminus at Rockport, and the handling of Government telegrams, the transmission of news matter, market quotations, and such business as is usually offered to a public telegraph company. About 600,000 cable messages pass over this line a year, and a break in the line of the com-

pany would deprive the cable system of a very important part of its facilities. (Record, pp. 20, 29.) A considerable amount of Government business passes over this line. (Record, pp. 19, 29.) The appellee prior to the construction of this line in the Town of Essex filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations of the Act of Congress of July 24, 1866. (Record, pp. 19, 29, 39.) The roads and highways within the Town of Essex upon which the appellee's line is maintained are Western Avenue, Main Street and Eastern Avenue, as appears from the fourth paragraph of the bill of complaint and the third and eighth paragraphs of the cross-bill. (Record, pp. 3, 12, 13.) These roads and highways are public roads and highways kept up and maintained as such within the meaning of the Act of Congress of March 1, 1884, as appears from paragraph 3 of the cross-bill (Record, p. 12), which alleges: "That from time to time the defendant has established public highways within its borders and at its sole expense has built and maintained the same from time immemorial. That among those public highways so constructed and maintained are the following named streets: Western Avenue, Main Street and Eastern Avenue."

George F. Bartlett, constructor, assistant superintendent and right-of-way man for the appellee in 1884, testified that he prepared a petition in writing for a right of way in the Town of Essex for the appellee's telegraph line, and presented it to Mr. Bartlett, the chairman of the Board of Selectmen of the town; that the petition contained the location of streets through which the line was to pass, and was presented to the chairman in June or July, 1884, before any line was constructed; that he had a conference with Mr. Bartlett and the other two selectmen, at Mr. Bartlett's house, and Mr. Bartlett told the witness that the petition would be granted. On cross-examina-

tion the witness testified that he did not see the permit signed by the selectmen, and had no personal knowledge that it ever was signed. (George F. Bartlett, Record, pp. 32, 33.)

The only evidence offered by the town in contradiction of the foregoing testimony of George F. Bartlett was the testimony of Sargent (Record p. 40), who said that he had heard Mr. Bartlett, the chairman of the Board of Selectmen of the town in 1884 (who was dead at the time of the hearing), say that the company had no rights to go through the town; the testimony of James (Record, p. 41) that he heard said Bartlett say that the Cable Company had no permit whatever to locate their poles in the town; the testimony of John B. Bartlett (Record, p. 41), the son of the former chairman, who said that he had heard his father say that the appellee had no location; and the testimony of Cogswell (Record, p. 45) that he inferred from what Mr. Bartlett, the former selectman, said, that they had definitely acted on the request and had refused it.

After the appellee's incorporation in April, 1884, and after the application for a location made by its agent, George F. Bartlett, as aforesaid, the appellee constructed a telegraph line about four miles in length, consisting of 186 poles and wires thereon, carried through Essex from the line between it and the adjoining town of Hamilton, through highways or roads within Essex, known as Western Avenue, Main Street and Eastern Avenue, to the line between Essex and the adjoining town of Gloucester. (Record, p. 13, par. 8; pp. 19, 20; Atchison, Record, p. 33; Hazelton, Record, p. 39.)

During the construction of the line, and for seven or eight years afterwards, no objection appears to have been made by the town to the construction of the line or the presence of the poles and wires in the streets. (George F. Bartlett, Record, p. 33; Atchison, Record, p. 33; Hazelton,

Record, p. 39.) At the time of the construction of the electric railway through the town, which was about 1895, the selectmen asked the appellee to move a number of its poles out of the way of the electric railway. The appellee's employee, McCaffrey, went over the route with Selectman Kimball, and Kimball pointed out to him where the poles might be set after they had been moved out of the way of the electric railway. About half the poles in the town were so moved at the request of the selectmen, into locations designated by Selectman Kimball. (McCaffrey, Record, p. 34.)

During the twenty-one years from 1884 to 1905, the appellee maintained and operated the line constructed through Essex, as above, without interference on the part of the town. (Record, p. 20.) While the town denied in its answer (Record, p. 9) the allegation in the bill of complaint that the highways were of sufficient width to allow the construction and operation of the line without inconvenience (Record, p. 3), the cross-bill contains no allegation that the line would involve any inconvenience or interference with travel on the streets, and the District Court found that "the evidence does not show any interference by this line with the ordinary travel on the roads mentioned". (Record, p. 20.)

In 1902 the appellee's line in Essex was in a very bad condition and very seriously in need of reconstruction, relocation, resetting and repairs, as appears from the testimony of Hebb. (Record, pp. 35, 36.) Accordingly on February 3, 1902, Hebb, in behalf of the appellee, presented a petition in writing for a location for appellee's poles and wires and license to maintain the same on the following named streets and highways of the town, namely: from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions then

occupied by the old poles, and any changes in the locations to be made under the direction of the Board. (Record, pp. 45, 46.) No definite action appears to have been taken on this petition (Hebb, Record, p. 36; Cogswell, Record, p. 44), but Cogswell testified that he considered the Board's failure to act on the petition as equivalent to a refusal. (Cogswell, Record, p. 45.) By the time the appellee's bill of complaint was brought its line in the Town of Essex was in an exceedingly unsafe and dangerous condition and in extreme need of repair, relocation and resetting. It appeared that the poles were badly decayed both at the tops and in the ground (Pillsbury, Record, p. 30; Hebb, Record, p. 35); that the poles were too high for safety, in some instances as high as 75 feet (Pillsbury, Record, p. 30; McCaffrey, Record, p. 34; Hebb, Record, p. 35); that in many instances they leaned over at angles, the tops being two or three feet out of line from the bottoms (Bartlett, Record, p. 41); that the line was so weak that a violent windstorm was liable to blow it over, or the giving way of a guy on a corner pole would allow the line to fall into the street, and this did actually happen just prior to the application to rebuild, resulting in the blocking of the street and stopping the trolley cars after dark (Pillsbury, Record, p. 31); that the line was in such a condition that it was likely to fall down and cross the trolley, which would mean great danger to life and property all along the route, besides interrupting the telegraph company's traffic and the street car service; that the effects of crossing wires may be felt for hundreds of miles; that fires may be, and have been, set from this cause (Pillsbury, Record, p. 31; Hebb, Record, p. 36); that for most of its length the line was too near the trolley wire (Hebb, Record, p. 36); that this fact made necessary the use of brackets and side arm construction, which is weak and inferior construction and generally considered unsafe

(Pillsbury, Record, p. 30; Ryan, p. 36); that in many places the wires were badly mixed in with the trees (Ryan, Record, p. 38); that in others the construction of driveways, lawns, etc., made the location of the poles a nuisance to abutters and very undesirable on all grounds (Pillsbury, Record, p. 30; Ryan, Record, p. 38); that the poles were badly out of alignment, not only with themselves, but with the poles of the telephone company and the electric railroad. (Hebb, Record, pp. 35, 36; Bartlett, Record, p. 42.)

The District Court found that repairs to the line through Essex had become necessary, and a new location desirable in connection with them. (Record, p. 20.) The District Court also found in regard to certain changes that were made by the appellee after the temporary injunction was obtained: "That the admitted changes in the location of some of the poles were only such as were necessary to keep the line in a reasonably safe condition, and that there have been no changes amounting to a change of the location occupied in 1884 and since." (Record, p. 21.)

Accordingly, on June 1, 1905, William Ryan, the foreman of construction of the appellee, presented to the selectmen of the town in behalf of the appellee a petition for a location for its poles and wires and license to maintain the same in the following named streets and highways of said town, namely: from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions then occupied by the old poles and any changes in the locations to be made under the direction of the Board. (Ryan, Record, p. 37; Defendant's Exhibit 1, Record, p. 51.)

After receiving this petition the selectmen called a hearing for June 30, 1905, of the abutters on the streets in which the line is located, and the hearing was held on the day appointed. (Cogswell, Record, p. 44; Kimball, Record,

p. 42; Ryan, Record, p. 37; Complainant's Exhibit 5, Record, p. 46; Defendant's Exhibit A, Record, p. 47; Defendant's Exhibit D, Record, p. 48; Defendant's Exhibit F, Record, p. 49.) The sense of this meeting was against the granting of the petition. (Ryan, Record, p. 39.)

On July 10, 1905, at a meeting of the Board of Selectmen it was voted not to grant the petition and the appellee was so notified. (Cogswell, Record, p. 44; Defendant's Exhibit 6, Record, p. 46.)

Both the petition of 1902 (Defendant's Exhibit 3, Record, p. 45) and the petition of 1905 (Defendant's Exhibit 1, Record, p. 51) were for a "location", and were in the name of the New England Telegraph Company of New York; but the evidence makes it perfectly clear that the appellee is and always has been the owner of the line, that the people of the town thoroughly understood that the application was in behalf of the company that owned the line, and that what was wanted was permission to relocate under the supervision of the selectmen such of the poles as it was necessary to change in order to put the line in good condition. It appears that the New England Telegraph Company of Massachusetts is a part of a system of telegraph companies extending over the United States known to the public as the Postal Telegraph-Cable Company; that the lines in each State, however, are owned and operated by separate corporations organized under the laws of the State in which the lines are situated, each corporation being a distinct and independent company; that the various separate companies use the name "Postal Telegraph-Cable Company" merely as a trade-name in its relation with the public so as to get the advantage of the combined good-will of the association of separate companies. (Bruch, Record, p. 29.)

In accordance with this general scheme there were two separate corporations, the New England Telegraph Com-

pany, a corporation organized under the laws of Massachusetts, and the New England Telegraph Company, a corporation organized under the laws of New York. In neither case was the name of the State of incorporation a part of the corporate name. The New York company has no lines or property in Massachusetts, does no business there, and has nothing to do with the telegraph line in Essex (Bruch, Record, p. 28; Pillsbury, Record, p. 30), and the Massachusetts company has no lines or property outside of Massachusetts (Bruch, Record, p. 28), and no relation with the New York company other than an arrangement for transferring interstate business and the common use of the name "Postal Telegraph-Cable Company" in its relation with the public. While in its relations with the public the Massachusetts corporation uses the name "Postal Telegraph-Cable Company" in all formal transactions and in relation to the construction, operation and maintenance of its line and in its relations to the State, the Massachusetts corporation uses its charter name, The New England Telegraph Company, and describes itself as of Massachusetts. (Bruch, Record, p. 29.)

Mr. Pillsbury, who dictated the petitions, was not an officer of the New York corporation, and had nothing to do with it. (Pillsbury, Record, p. 30.) The line passing through Essex was built, maintained and operated by the Massachusetts company (Bruch, p. 28), and there was no reason for making this petition in the name of the New York company. As a matter of fact the petition referred to the line owned by the Massachusetts company. (Pillsbury, Record, pp. 30, 32.) It was made in behalf of the Massachusetts company (Pillsbury, Record, p. 32), and the description "of New York" was a mere slip of the pen (Bruch, Record, p. 29); or an error of nomenclature (Pillsbury, Record, p. 30); or a clerical error. (Ryan, Record, p. 37.)

The petitions themselves show that what was wanted was a designation of positions to be occupied by new poles needed for the line already running through Essex, the new poles to occupy practically the positions occupied by the old poles, and the selectmen to have the direction of any changes that might be made in the positions. (Defendant's Exhibit 3, Record, p. 45; Defendant's Exhibit 1, Record, p. 51.)

At the hearing on June 30, 1905, which the selectmen gave on the petition of 1905, the appellee was represented by its foreman of construction, Mr. Ryan. He testified that at this hearing either the chairman of the Board of Selectmen or the attorney for the town asked him if the petitioner was a foreign corporation, and what was meant by asking for a location rather than a relocation; that the witness stated to the board and those present at the hearing that the description of the petitioner and the use of the word "location" were mere clerical errors, and stated just what the petition asked for, and asked to have it returned so that the clerical errors might be corrected. (Ryan, Record, p. 37.) He further testified that he again asked leave to take the petition back to Superintendent Pillsbury to have the errors corrected. (Ryan, Record, p. 37.) Sargent, called as a witness for the town, remembered that Ryan had said at the hearing that these were errors. (Sargent, Record, p. 40.) Burnham, another of the town's witnesses, remembered Ryan saying that the different names referred to the same company, that is, the one with the big poles, and the one already there in the town, and did not understand that it was for a new line of poles. (Burnham, Record, p. 42.)

So, too, Selectman Kimball, testifying for the town, stated that Mr. Cogswell, the chairman at this hearing, explained who the petitioners were, and referred to them as "the Cable Company going through the town", with

the statement that he did not know the name, that they went under a variety of names, but that that was the line referred to, and made it clear that it was the same company that owned the line then there, and that what they wanted was a location for that same line. (Kimball, Record, p. 43.) Cogswell, himself, testified that someone at the hearing asked what company was petitioning, and that he read the name on the petition and said "it is the company that has the large poles in the town". (Cogswell, Record, p. 45.)

There is no dispute that "the company with the large poles" is the appellee.

The foregoing evidence makes it clear that the selectmen thoroughly understood what was intended to be asked for by the petition of 1905, and in whose behalf it was presented. It is also clear on the evidence that it would not have made a particle of difference in the action of the selectmen upon this petition if it had been signed "New England Telegraph Company of Massachusetts" and had used the word "relocation" instead of "location". When Foreman Ryan asked to have the application returned so that the signature and term "location" might be changed, he was told that it was not necessary to have the petition returned, and it was not returned to him. (Ryan, Record, pp. 37, 38, 39.) Ryan asked the Board if they wished him to take the application back to Mr. Pillsbury and was told that it did not matter, that they would not consider any application (Ryan, Record, pp. 38, 39); and Selectman Kimball admitted that if the petition had been in the name of the Massachusetts company it would not have been granted. (Kimball, Record, p. 43.) The same witness testified that at a conference held after the hearing in the office of Superintendent Pillsbury at Boston, at which representatives of the appellee, and its counsel, Mr. Wardner, the selectmen and their counsel, Mr.

Richardson, were present, he remembered Mr. Wardner's asking the selectmen whether it made any difference if the petition used that name and asked for a location, and that the reply was that it did not make any difference; that the object of the town was to discover the right which any telegraph company had to use its streets, and if it had a right, well and good, and if it did not have a right, the town was not going to have any telegraph company there. (Kimball, Record, p. 43.) This witness was asked on cross-examination whether he did not meet Mr. Ryan shortly after the meeting of June 30, and whether he did not say to Mr. Ryan that the form of the petition made no difference; that the fact that they asked for a location and the fact that they applied in the name of the Telegraph Company of New York was not of importance, but that the idea was to dispute the right of the Telegraph Company to be there, and that was why they refused the petition. Witness replied that he did not remember of saying it made no difference; he may have said he wanted to raise the question of the right of the company to be there, whatever company it might be that owned those poles and wires. (Kimball, Record, p. 44.) Ryan testified that at the conference in Mr. Pillsbury's office Mr. Richardson, the town's counsel, told Mr. Pillsbury that they did not propose to have any poles of the New England Telegraph Company in the town on any street if they could prevent it, and that Mr. Kimball said that there were no streets they wanted the company to use in the Town of Essex; that the upshot of the conference was that the company could not set any poles in the Town of Essex unless the court said so. (Ryan, Record, pp. 37, 38.)

Superintendent Pillsbury testified that counsel for the selectmen, Mr. Richardson, at the conference in Mr. Pillsbury's office, stated to him that the town wanted the poles taken entirely out of town, would not grant the com-

pany's petition, and would prevent construction work if necessary by force. (Pillsbury, Record, pp. 30, 31.)

Ryan testified that he had several interviews with different members of the Board of Selectmen after the public hearing on June 30, 1905, and prior to July 11, 1905, and that he asked the chairman if he had any objection to the company's going ahead and repairing the line as it stood, replacing the poles with new poles, and he said that if the company made any attempt to do any work in the town, the town would find a way to stop it, and that the witness took the chairman to mean that he would have the gang arrested. (Ryan, Record, p. 37.)

The District Court found that the selectmen's "refusal to grant the application was not upon the ground that it was applied for in the name of the New England Telegraph Co. of New York instead of in the name of the plaintiff, but was a refusal, upon other grounds below appearing, to grant the plaintiff or any company connected with it, any location within the town. At a subsequent conference between the selectmen and the representatives of the plaintiff it was stated to the plaintiff, by or on behalf of the selectmen, that they would not grant a location to any company, in any street of the Town, unless actually forced to give it, and that they desired to raise the question of the company's rights to be in the town. Also that the selectmen wanted the poles taken entirely out of the Town and would prevent construction work by force if necessary. The selectmen or their chairman were asked if there was objection to the repair of the line as it stood, merely replacing old poles with new ones. The reply was, that there was objection, and that any work by the company within the Town would be stopped." (Record, pp. 20, 21.)

Thereafter the bill of complaint was filed, as above stated, on July 31, 1905. Between the filing of the bill

and the coming in of the town's answer and cross-bill the appellee did some construction and made some changes. Poles were renewed, and wherever it was found necessary new wire was put in and also new cross arms (Pillsbury, Record, p. 31), but the court found that the changes were only such as were necessary to keep the line in a reasonably safe condition, and that there had been no changes amounting to a change of the location occupied in 1884 and since. (Record, p. 21.)

STATUTES, FEDERAL AND STATE, WHICH HAVE, OR MAY BE CONTENDED TO HAVE, A BEARING ON THE QUESTIONS INVOLVED IN THE CASE.

The Federal Statutes that are material are the Act of Congress of July 24, 1866, and the Act of March 1, 1884. The Act of July 24, 1866 (14 Stat. 221, c. 230), as amended appears in the Revised Statutes as Sections 5263 to 5268 inclusive. The material sections are as follows: —

Section 5263:

> " Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

Section 5264:

"Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other."

Section 5266:

"Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section."

Section 5267:

"The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for

postal, military, and other purposes', or under this Title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected."

Section 5268:

"Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law."

The Act of March 1, 1884, chapter 9 (23 Stat. 3; 2 Comp. St. p. 2708), is as follows:—

"Be it enacted, etc., That all public roads and highways while kept up and maintained as such are hereby declared to be post routes."

The Massachusetts Statutes which were in force when the appellee's line was built (1884) and which may be claimed to be applicable were Public Statutes, chapter 27, Section 49, and chapter 109, Sections 1, 2, 3 and 15, all of which are printed in full in the record at pages 24 and 25. All these laws remained in force until the revision of 1902. The material provisions of that revision are Revised Laws, chapter 25, Sections 54 and 56, and chapter 122, Sections 1, 2 and 26, all of which except 54 are printed in the record at page 26.

Section 54 of Chapter 25 is as follows:—

"The selectmen may, within their respective towns, permit telegraph and telephone lines to be laid under any way or square, and may establish reasonable regulations for the erection and maintenance of all lines for the transmission of intelligence by telegraph

or telephone, by electricity or otherwise, or for the transmission by electricity of light, or of heat or power except such as is used by street railway companies, by every person having authority to place poles, wires, structures and other appliances for any purpose in or under public ways or places, including all lines owned or used by said towns."

The only statute affecting the case passed after the revision of 1902 was chapter 237 of the Acts of 1903, which is printed in the record at page 26.

PRELIMINARY REMARKS.

The issue is this case is whether or not the Act of July 24, 1866, protects the telegraph company from being arbitrarily excluded by the Town of Essex from its streets.

The Act has been many times before this Court for interpretation. The appellee is well aware that the Act is very far from having taken away from the States all right to legislate in regard to the terms and conditions upon which streets and highways may be occupied by interstate and foreign telegraph lines.

The appellee does not dispute that notwithstanding the Act the property of such companies including their corporate franchises is subject to local taxation.

Western Union Tel. Co. v. *Texas*, 105 U. S. 460.
Western Union Tel. Co. v. *Attorney General*, 125 U. S. 530; 141 U. S. 40.
Leloup v. *Mobile*, 127 U. S. 640.
Postal Telegraph-Cable Co. v. *Charleston*, 153 U. S. 692.
Postal Telegraph-Cable Co. v. *Adams*, 155 U. S. 688.
Western Union Tel. Co. v. *Taggart*, 163 U. S. 1.
Western Union Tel. Co. v. *Gottlieb*, 190 U. S. 412.

Nor that a State or municipality if authorized by the State

so to do may charge such a telegraph company a reasonable rental for the use of its streets.

St. Louis v. *Western Union Tel. Co.*, 148 U.S. 92.
Postal Telegraph-Cable Co. v. *Baltimore*, 156 U.S. 210.

Nor that such telegraph companies are subject to the police power of the States, and therefore to State and municipal regulation and supervision, particularly with reference to the occupation of streets and highways by telegraph lines.

Western Union Tel. Co. v. *Pendleton*, 122 U.S. 347.
Western Union Tel. Co. v. *James*, 162 U.S. 650.
Western Union Tel. Co. v. *Richmond*, 224 U.S. 160.
Western Union Tel. Co. v. *New York*, 38 Fed. Rep. 552.
Richmond v. *Southern Bell Tel. Co.*,, 85 Fed. Rep. 19.

Nor that a State or municipality when duly authorized by the State has the right to charge such telegraph companies with the reasonable cost of inspection, supervision and regulation carried on under the police power.

Western Union Tel Co. v. *New Hope*, 187 U.S. 419.
Atlantic & Pacific Tel. Co. v. *Philadelphia*, 190 U.S. 160.
Postal Telegraph-Cable Co. v. *New Hope*, 192 U.S. 55.
Postal Telegraph-Cable Co. v. *Taylor*, 192 U.S. 64.

No question of taxation, rental, police regulation or charges are involved in this case. The record presents to this Court the bald question whether a telegraph company which for twenty years has occupied streets in a town, and has done everything in its power to comply with

State and municipal laws and regulations relating to the occupation of streets and highways by telegraph companies, can be arbitrarily excluded entirely by the town from its streets.

It will be convenient here to notice and dispose of certain minor points and details.

The bill alleges that the appellee prior to the construction of its line in Essex duly filed " with the Post Master General of the United States its written acceptance of the restrictions and obligations of the Act of Congress of the United States, entitled ' An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and other Purposes ' approved July 24, 1866, and the amendments thereto ". (Record, p. 2.)

The appellant in its answer stated that it had no knowledge that the plaintiff duly filed such acceptance, and therefore denied the allegation and called upon the plaintiff to prove the same. (Record, p. 8.) The District Court found that the averment of the bill in this particular was sustained by the evidence (Record, p. 19), and it is agreed for the purpose of this appeal that the company and the New England Telegraph Company of New York have duly accepted the provisions of the Telegraph Act of Congress. (Record, p. 39.)

No attempt is made to dispute the fact that a large part of the business done over the appellee's line in the Town of Essex is interstate and foreign commerce, nor that in respect to a part of such business the appellee acts as a Government agent.

The record makes it clear that the appellee was incorporated to do, and has ever since done, an interstate and foreign telegraph business. The evidence establishing this fact and the finding of the District Court thereon

have already been set forth in this brief (see pp. 8 and 9) and appear on pages 19, 20 and 29 of the record.

It is not now open to question that such business is interstate and foreign commerce.

Pensacola Tel. Co. v. *Western Union Tel. Co.*, 96 U. S. 1.
Western Union Tel. Co. v. *Texas*, 105 U. S. 460.
Western Union Tel. Co. v. *Pendleton*, 122 U. S. 347.
Leloup v. *Port of Mobile*, 127 U. S. 640.
Western Union Tel. Co. v. *Alabama*, 132 U. S. 472.
St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92.
Western Union Telegraph Co. v. *James*, 162 U. S. 650.

It is equally clear that a telegraph company which has accepted the provisions of the Act of July 24, 1886, and pursuant thereto transmits Government messages at rates fixed by the Postmaster General becomes a Government agent.

Western Union Tel. Co. v. *Texas*, 105 U. S. 460.

The District Court found that the appellee in this case was engaged in transmitting interstate, international and Government messages (Record, p. 22), and, as has already been pointed out, Mr. Bruch, the treasurer of the company, testified that part of the business of the company was the handling of Government telegrams. (Record, p. 29.)

There can be no doubt therefore that the appellee came into the Town of Essex with its line of telegraph and has maintained it there since as a Governmental agency performing an important function of interstate and foreign commerce.

The appellee's rights under the Act of 1866 are of course conditional on its lines in the streets of the town not interfering with ordinary travel on those streets.

But no serious contention is made that there was any such interference.

While the town in its answer denied the allegation of the bill that the streets were of sufficient width to allow of the construction and operation of the line without inconvenience (Record, pp. 2, 9) the cross-bill contains no allegation that the line would involve any inconvenience or interference with travel on the streets. The town offered no evidence tending to show any such inconvenience or interference, and it made no such claim at the hearing in the District Court.

On the other hand the appellee did offer evidence tending to show that its line did not interfere with ordinary travel on the streets, and the District Court so found. (Record, p. 20.)

This Court will take judicial notice of the fact that the Town of Essex is a country village of not more than 2,000 inhabitants.

It is inconceivable that if there had been any interference with ordinary travel the line could have been maintained in the streets of the town six years without any objection whatever, and for more than twenty years without any attempt to procure the removal of the line.

There being no evidence in the record that the appellee's line interfered with ordinary travel on the streets, the finding of the District Court should not be disturbed.

In the District Court the contention was made that the streets upon which the appellee's line of telegraph is maintained are not post roads, on the theory that the Act of March 1, 1884, chapter 9 (28 St. 3), in making all public roads and highways kept up and maintained as such "post routes", did not make such roads and highways "post roads" under the Act of 1866.

Western Avenue, Main Street and Eastern Avenue, the streets in the town occupied by appellee's line (Bill of Complaint, par. 4, Record, p. 3; cross-bill, pars. 3, 8, Record, pp. 12, 13; Opinion of District Court, Record, p. 20), were and are public roads and highways kept up and

maintained as such (cross-bill, pars. 3, 8, Record, pp. 12, 13; Opinion of District Court, Record, p. 22), and are, therefore, "post routes" within the meaning of the Act of 1884.

The distinction attempted to be made by the appellant between "post routes" and "post roads" is without foundation.

In *Richmond* v. *Southern Bell Tel. Co.*, 174 U. S. 761, at page 763,

Mr. Justice Harlan said: —

> "Subsequently, by an Act approved June 8, 1872, all the waters of the United States during the time the mail was carried thereon; all railways and parts of railways which were then or might thereafter be put in operation; all canals, and all plank roads; and all letter carrier routes established in any city or town for the collection and delivery of mail matter by carriers were declared by Congress to be 'post roads'. 17 Stat. 308, c. 335. These provisions are preserved in Section 3964 of the Revised Statutes of the United States. By an Act approved March 1, 1884, 'all public roads and highways, while kept up and maintained as such' were declared to be 'post roads'. 23 Stat. 3, c. 9."

See also —

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92, 100.
Western Union Tel. Co. v. *Penn. R. R. Co.*, 195 U. S. 540, 559.

In *Western Union Tel. Co.* v. *Richmond*, 224 U. S. 160, at page 165,

Mr. Justice Holmes said: —

> "The Act of Congress gives to telegraph companies that accept its provisions the right to con-

struct, maintain and operate lines over the post-roads of the United States, such as the streets of Richmond concerned are admitted to be. Rev. Stats. Sec. 3964, Act of March 1, 1884, c. 9, 23 Stat. 3."

The courts have invariably treated the Act of March 1, 1884, as having made public highways and roads kept up and maintained as such post roads.

Ex parte Conway, 48 Fed. 77 (C.C. So. Carolina, 1891).

In re Matthews, 122 Fed. 248, 258 (D. S. E. D. of Kentucky, 1902).

City of Newcastle v. *Postal Telegraph-Cable Co.*, 152 Fed. 572 (C.C. Western Dist. of Pa. 1907).

Western Union Tel. Co. v. *Richmond*, 178 Fed. 310, 312 (Circuit Court, Eastern Dist. of Va. 1909).

Mackay Tel. & Cable Co. v. *City of Texarkana*, 199 Fed. 347, 348 (D. C. Western Dist. of Ark. Texarkana Div. 1912).

The statement of the court below "that 'post routes' as there used means anything different than 'post roads' I am unable to believe, in view of the decisions which have treated this enactment as an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8), to establish post offices and post roads", is clearly correct.

No question is made, as, indeed, none could be made, that either the Act of 1866 or the Act of 1884 are constitutional. The validity of neither act has ever been questioned and both have been treated by the courts ever since their passage as constitutional enactments under the power given by the constitution to Congress to regulate commerce with foreign nations and among the several States (Art. 1, Sec. 8, par. 3), and to establish post offices and post roads. (Art. 1, Sec. 8, par. 7.)

The case presents no difficulty as to the respective

rights of the abutters and the town in the streets in question. Both are well settled.

It is perfectly true, as alleged in the third and fourth paragraphs of the cross-bill (Record, pp. 12, 13), "that from time to time the defendant has established public highways within its borders and at its sole expense has maintained the same from time immemorial; that among those public highways so constructed and maintained are the following named streets: Western Avenue, Main Street and Eastern Avenue"; that no corporation or person whatsoever have any interest in these highways "except the inhabitants of the town who are abutters thereon and who own the fee in said streets, subject to the right of the public to pass and repass thereon". In other words, the fee in the streets in which the company's line is located is in the abutters, subject to the public easement, and this is the usual and customary state of things in Massachusetts. It is settled law in Massachusetts that where a public street or highway is laid out by public authorities over land belonging to private persons, the fee remains in the abutters and an easement in favor of the public is taken; that that easement includes not only the right of passing and repassing by travelers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, but also for the transmission of intelligence by telegraph lines consisting of poles and wires erected in the streets.

Pierce v. *Drew*, 136 Mass. 75.

It is clear that neither the State nor the Town of Essex owns land in the streets occupied by the appellee's line of telegraph, but, on the contrary, the fee in that land is owned by the abutters on those streets, and that those abutters and their predecessors in title received full com-

pensation for the use of said streets by the telegraph line when the land was appropriated for street purposes.

Pierce v. *Drew, supra.*

ARGUMENT.

I.

FROM PUBLIC STREETS AND HIGHWAYS WHICH ARE POST ROADS AND WHICH ARE NOT OWNED BY A STATE OR MUNICIPALITY THEREIN, BUT IN WHICH THE FEE IS OWNED BY ABUTTERS, SUBJECT TO A PUBLIC EASEMENT, INCLUDING THE OCCUPATION OF SAID STREETS AND HIGHWAYS BY A TELEGRAPH LINE, A TELEGRAPH COMPANY WHICH HAS ACCEPTED THE PROVISIONS AND OBLIGATIONS OF THE ACT OF JULY 24, 1886, AND WHOSE LINE DOES NOT INTERFERE WITH ORDINARY TRAVEL ON SUCH STREETS AND HIGHWAYS, CANNOT BE ABSOLUTELY EXCLUDED BY ANY STATE OR MUNICIPALITY, AND IN SAID STREETS AND HIGHWAYS SUCH A COMPANY HAS UNDER SAID ACT OF CONGRESS A RIGHT TO CONSTRUCT AND MAINTAIN ITS LINE OF TELEGRAPH, SUBJECT, OF COURSE, TO PROPER STATE AND MUNICIPAL REGULATION AND SUPERVISION.

In *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1,

this Court held that a bill in equity was properly dismissed in which bill the plaintiff, to which the Legislature of Florida had granted the exclusive right to establish telegraph lines in certain counties of the State, sought to enjoin the defendant from constructing a telegraph line in said counties on the right of way of a railroad which had granted the defendant company the right so to do. The court held that the State statute was in conflict with the Act of Congress of July 24, 1866, and Revised Statutes,

Section 3964, and was invalid. The court declared that the telegraph was an instrument of commerce and these acts of Congress constituted a legitimate exercise of the powers of Congress under the commerce clause of the Federal Constitution, and under the power conferred thereby upon Congress to establish post offices and post roads.

The court said: —

> "The Government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar attitude is to protect one part of the country from encroachments by another upon the national rights which belong to all. . . . The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction. It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The Statute of July 24, 1866, 14 Stat. at L., 221, in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if

they accept the terms proposed by the National Government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, *no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.* [Italics ours.] . . . No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such an attempt has been made. *The use of public property alone is granted.* [Italics ours.] If private property is required, it must, so far as the present legislation is concerned, be obtained by a private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted. The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress."

If this case does not expressly decide that where the consent of the owner of the fee in the street is obtained a State cannot wholly exclude an interstate telegraph company from erecting its line in such street should it have become a post road, nevertheless when the court declared that the Act "does provide that whenever the consent of the owner is obtained no State legislation shall

prevent the occupation of post roads for telegraph purposes", and that "the use of public property alone is granted", the court unmistakably showed that in its opinion at least the Act of 1866 did give a telegraph company under such conditions a right to occupy the post roads of the United States, whether the post roads were public streets, railroads or anything else.

Indeed Mr. Justice Field in his dissenting opinion declared that such was the necessary effect of the opinion of the court. He said: —

> "Yet the doctrine asserted by the majority of the Court goes to this length: That, if the owners of the property along the streets consent to the erection of such lines by a foreign corporation, the municipality and the State are powerless to prevent it, although the exclusive right to erect them may have been granted by a State to a corporation of its own creation."

In *Western Union Tel. Co.* v. *Texas,* 105 U.S. 460, this Court held unconstitutional a law imposing on all telegraph companies doing business in Texas a tax for every message sent. The court said: —

> "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself."

The court then pointed out that telegraph companies which availed themselves of privileges conferred by the Act of 1866 were by its terms bound to give the United States precedence in the use of their lines at rates fixed the Postmaster-General and so "as to government

business, companies of this class become government agencies".

The court further said: —

> "The Western Union Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business."

See also —

Western Union Tel. Co. v. *Pendleton,* 122 U.S. 347.
Ratterman v. *Western Union Tel. Co.,* 127 U.S. 411.
W. U. Tel. Co. v. *Alabama,* 132 U.S. 472.
W. U. Tel. Co. v. *James,* 162 U.S. 650.

In *Pembina Mining Co.* v. *Pennsylvania,* 125 U.S. 181, at page 186, the court, after referring to the Pensacola case, said: —

> "And undoubtedly a corporation of one state, employed in the business of the general government, may do such business in other states without obtaining a license from them."

In *Western Union Tel. Co.* v. *Massachusetts,* 125 U.S. 530,

a bill was filed by the attorney general of the State at the relation of the State treasurer against the telegraph company to compel it to pay a tax levied by the State on the company's corporate franchise and to enjoin the company from the further transaction of its business until the tax had been paid. The bill was brought under Public Statutes, chapter 13, Section 54, authorizing the collection of the tax by information brought in the Supreme Judicial Court at the relation of the treasurer of the Common-

wealth, upon which information the court was authorized to issue an injunction restraining further prosecution of the business until the tax had been paid.

As was pointed out in a later case, *Western Union Tel. Co.* v. *Pennsylvania Railroad Co.*, 195 U.S. 540, the telegraph company was in occupation of the post roads of the State of Massachusetts, but whether railroads or the ordinary highways, or both, does not appear, although its right to be there was not controverted.

The court held that the Massachusetts corporate franchise tax in its relation to telegraph companies was valid, but that that part of it which provided for enjoining such companies from doing business in the State in case of the non-payment of the tax was invalid. The court said:—

> "The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy to the laws of the State under which it is organized. But the privilege of running the lines of its wires 'through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, . . . and over, under, or across the navigable streams or waters of the United States', is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation. *While the State could*

not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there [italics ours], nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. . . . *This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions the right to run their lines over the roads and bridges which have been declared to be post roads of the United States.*" (Italics ours.)

The court, however, then pointed out that in the court below an injunction had been awarded against the company restraining it from the further prosecution of its business until the tax had been paid, and said: —

"The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions 'shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or postroads of the United States'. It is found in this case that 2334.55 miles of the company's lines, out of 2833.05 on which this tax is assessed, are along and over such post roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State. *If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the*

State can have no authority to say it shall not be done." (Italics ours.)

The court accordingly reversed that portion of the decree of the court below which awarded the injunction.

If the post roads occupied by the telegraph company in this case were all railroads from which the telegraph company had obtained permission to occupy their rights of way, the State of Massachusetts could not, of course, under the authority of the Pensacola case, exclude the telegraph company from such post roads. On the other hand, if the post roads occupied by the telegraph company were public highways then if the right to occupy such post roads was not given by the Act of Congress of 1866, the State would have the right to exclude the telegraph company from such post roads, because, as pointed out by the appellant here on pages 40 to 44, inclusive, of his brief, any permission given to the telegraph company by the State to occupy such post roads could have been no more than a license and revocable at the pleasure of the State, so that the State would not only have the right of excluding the company from such streets for the purpose of collecting a State tax, but would have the right so to exclude it even arbitrarily. As it does not appear whether the lines of the telegraph company were upon railroad rights of way or upon public highways, the declaration of the court that the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads or stop the use of them after they were placed there must be taken to have been made with reference to both classes of post roads, and is not a dictum, but a necessary part of the decision.

In *Leloup* v. *Port of Mobile,* 127 U.S. 640,

it was held that a State cannot as a condition of doing

business within its jurisdiction, exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the Act of July 24, 1866. The court said: —

> "Can a State prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. . . . Communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different states, it is commerce among the several states, and directly within the power of regulation conferred upon Congress and free from the control of state regulations except such as are strictly of a police character."

The litigation which arose between the City of St. Louis and the Western Union Telegraph Company is particularly instructive. The city passed an ordinance requiring telegraph companies to pay $5 per pole for using the streets, alleys and public places of the city. In the suit brought by the city against the Western Union Company to recover the tax in the Circuit Court for the Eastern District of Missouri (E. D.) the court held that the ordinance was obnoxious to the commerce clause of the Federal Constitution.

St. Louis v. *Western Union Tel. Co.*, 39 Fed. 59.

This decision was reversed by this Court in —

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92.

This Court, while holding that the statute did not

authorize a telegraph company to enter upon the private property of an individual and appropriate it without compensation, nor to enter upon property of a public nature belonging to a State without compensation, and that this rule extended to streets and highways, and that the City of St. Louis was entitled to charge a reasonable rental for the occupation of its streets by the telegraph company, nevertheless quoted with approval that passage of the opinion of this Court in *Western Union Telegraph Co.* v. *Massachusetts* which declares that a city could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, and further said: —

> "Indeed, it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; *that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts* [italics ours], and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."

There was a rehearing on the question whether the city had the right to charge a rental under its charter, and its right was affirmed.

St. Louis v. *W. U. Tel. Co.*, 149 U. S. 465.

The case then went back to the Circuit Court to deter-

mine, on the above principles, what, if anything, the city might recover of the company.

St. Louis v. *W. U. Tel. Co.*, 63 Fed. 68.

Judgment was entered for the defendant. Among other things the court at page 73 said: —

> "The defendant company is in the city, with its poles and wires on the streets, under the paramount authority of an act of the federal congress. It comes as a governmental agency, in performing an important function of interstate commerce. It neither asks nor can the city demand any permit or license to be and remain on such public highway. It has the right to demand the use of the plaintiff's streets and alleys, and the plaintiff must submit to such use with or without an ordinance."

If, as the appellee interprets the decision of this Court in this case, it means that the State or city can absolutely exclude a telegraph line from its streets, it could make the right to occupy them conditional on the payment of any amount the city might see fit to require, and it would not lie in the power of this Court or any other court to pass upon the reasonableness of the amount. The inquiry would distinctly not be open in the courts. The very fact that this Court went into the question of the reasonableness of the rental necessarily implies a negation by reason of the Act of Congress of 1866 of the absolute right of exclusion, otherwise there would have been no Federal question. The declaration of this Court that the occupation by this interstate commerce company of the streets cannot be denied by the city, constitutes the very foundation of the court's decision and of its jurisdiciion over the case.

In *Postal Tel. Cable Co.* v. *Charleston*, 153 U. S. 692, the court affirmed the validity of a city ordinance providing that telegraph companies should obtain a license for doing intra-state business and not including business done to or from points within the state or business done for the United States Government, the ordinance also requiring the telegraph company to pay $500 for the license. The court holding that while a state could not exclude a foreign corporation doing interstate commerce or acting as an agent of the United States government, or attach conditions to the exercise of its franchise, this doctrine did not apply to the intra state business of such a corporation.

In a similar case the court held that such legislation by a State was valid "if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." "But", the court said, "a State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions."

See *Postal Tel. Cable Co.* v. *Adams*, 155 U. S. 688, 696.

In *U. S.* v. *Union Pac. Ry.*, 160 U. S. 1, it was held that a contract between the railroad and the Western Union Telegraph Company whereby the former attempted to give the latter exclusive privileges on the railroad right of way and undertook not to permit other telegraph companies to use its right of way except with the consent of the Western Union Company, was void as being in conflict with the Act of July 24, 1866, which, the court at page 41 said, "gave every telegraph company, organized under State laws and accepting its provisions

the right to erect its poles and wires upon the post roads of the United States".

In *City of Richmond* v. *Southern Bell Tel. & Tel. Co.*, 78 Fed. 858,

the company sought to enjoin the city from interfering with the company's poles and wires. The city professed to act under a city ordinance imposing a number of conditions on the company, among others that the poles and wires should only be permitted to remain on condition that the company should first have petitioned for and received permission to erect its poles in accordance with the conditions of the ordinance. A demurrer was overruled. The court at page 860 said:

> "The defendant also claimed in its written demurrer filed in this cause that, if said Act of Congress (July 24, 1866) was intended to give to a telegraph company the right to erect poles and run wires along the streets of the city of Richmond without the consent of said city, such legislation was unconstitutional and void. This position was abandoned in the argument, and it was conceded that such act was constitutional; that all streets of the City of Richmond which are letter carrier routes are post roads within the meaning of said act; and that, under the same, a telegraph company can obtain a right of way for its poles and wires through and along the streets of a city without the consent of a municipality. These admissions are based on the decisions of the Supreme Court of the United States."

Citing *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 1.
Tel. Co. v. *Texas*, 105 U. S. 460.
Tel. Co. v. *Mass.*, 125 U. S. 530.
St. Louis v. *Tel. Co.*, 148 U. S. 92; 149 U. S. 465.

The court further said: —

"I think it is plain that the complainant, under the allegations in the bill contained, is a corporation entitled to exercise all the functions granted to telegraph companies under the laws of the state of New York, and that, under the act of Congress referred to, it has the privilege of running its lines through and over the streets of the city of Richmond, that are post roads of the United States, and that said city has no right to prevent it from so doing. While it is true that telegraph companies claiming the right under the laws of the United States to enter the territory of a state, and erect their poles and lines therein, must pay their due proportion of taxes, and submit to the ordinary reasonable regulations of the state and municipal authorities whose highways they use, and whose protection they claim and receive, still it is also true that neither the state nor the municipal authorities can prohibit them from entering their respective jurisdictions, nor require them to remove therefrom after they have established their lines. Such companies must submit to proper and reasonable local regulations, but they will not be expected to acquiesce in a city ordinance, not intended to regulate its management, but passed for the purpose of destroying its existence."

After the overruling of the demurrer (see 78 F. R. 858) the defendant filed its answer. The cause came to a full hearing and the Circuit Court decreed that the company had, under the Act of July 24, 1866 (which is an authority paramount and superior to any State law or city ordinance in conflict therewith), the right to construct, maintain and operate its lines over and along the streets and alleys of the City of Richmond, both those now occupied by the complainant company and those not so occupied, and to put up, renew, replace and repair its

lines, poles and wires over and along said streets and alleys as well as to maintain, construct and operate the same, and to connect its lines with new subscribers along said streets and alleys, and the said city was enjoined and restrained from cutting, removing or in any way injuring said lines, poles and wires and from preventing or interfering with the exercise of said rights by said company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising said rights.

The defendant then appealed to the Circuit Court of Appeals.

City of Richmond v. *Southern Bell Tel. & Tel. Co.*, 85 F. R. 19.

In the Court of Appeals the constitutionality of the Act of Congress of 1866 was recognized and admitted and that all streets which were letter carrier routes were post roads of the United States, and that under the Act of 1866 a telegraph company could obtain a right of way for its poles and wires through a city and along its streets against the wish of the municipality.

As to the extent of the protection of the Act of Congress, the court said: —

> "It is, therefore, subordinate to the public use. The privileges of this act, 'like any other franchise, are to be exercised in subordination to public as to private rights'. . . . These privileges must be enjoyed, subject to the lawful exercise of the police power."

The court further said: —

> "Streets and alleys in a city are the public property placed under the supervision and control of the municipality, the representative of the sovereign power. They exercise this supervision and control for the

benefit of the whole public, those living upon and those passing through such streets and alleys. And in the exercise of this supervision, which is the police power, they must see to it that the rights of the public and of private persons are not infringed. The complainant, under the act of Congress, has the right to use these highways. Neither the State nor any municipality can prevent it. . . . But this use must be subordinate to the rights of the public, must not endanger those rights. And as the municipality is the guardian of the public in this regard, it can establish such lawful provisions as may regulate the use, always, however, avoiding such regulations as will make the use burdensome and intolerable, and so practically impossible."

The court reviewed the provisions of the ordinance and finding that they appeared to have been stimulated by a desire to oppress and control, perhaps defeat, the existence of the complainant, held them to be not a lawful exercise of the police power.

The case went to the Supreme Court on certiorari and was reversed solely on the ground that the complainant was not entitled to the benefits of the Act of 1866, not being a telegraph company.

Richmond v. *Southern Bell Tel. & Tel. Co.*, 174 U. S. 761.

In *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239,

the telegraph company sought to restrain the railroad company from interfering with the plaintiff's rights in its telegraph line along the defendant's railroad. The suit was brought in the Circuit Court and the defendant attempted to remove it on the ground that it arose under the Constitution and laws of the United States. It was

held that the bill properly construed asserted that the right to maintain the telegraph company's line along the defendant's railroad was based upon a contract and not upon the Act of 1866. This Court said at page 243:—

> "It was not argued by counsel for the Telegraph Company that the Telegraph Company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; but it does provide, *that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.*" (Italics ours.)

The court further said:—

> "It was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction."

In other words, a railroad right of way is private property and in the absence of the owner's consent a telegraph company has no right under the Act of 1866 to enter upon such property and construct and maintain there its line of telegraph. There is nothing in this opinion which denies that a telegraph company has a right under the Act of 1866 to erect and maintain its line of telegraph in a public highway, which is a post road, if as against the private owner of the fee in the highway the

telegraph company, as in the present case, has a right to erect and maintain such a line. On the contrary, that a telegraph company has such a right seems expressly declared in the italicized portion of the above quotation from the court's opinion.

In *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S. 412, the questions involved were similar to those involved in the case of the *Western Union Telegraph Co.* v. *Massachusetts, supra.*

The court considered the Massachusetts case at length, and at page 423 said: —

> "These propositions were laid down: That the company owed its existence as a corporation and its right to exercise the business of telegraphy to the laws of the State under which it was organized; that the privilege of running the lines of its wires over and along the military and post roads of the United States was granted by the Act of Congress, but that the statute was merely permissive and conferred no exemption from the ordinary burdens of taxation; that the State could not by any specific statute prevent a corporation from placing its lines along the post roads or stop the use of them after they were so placed, but the corporation could be taxed in exchange for the protection it received from the State upon 'its real or personal property as any other person would be'."

In *Western Union Tel. Co.* v. *Pa. R. R. Co.*, 195 U. S. 540,

the telegraph company sought to prevent the railroad company by an injunction from removing from various railroad company's rights of way the telegraph lines of the plaintiff. The bill was in aid of an action at law to condemn a right of way for the plaintiff's lines on the

defendant's right of way. This Court held that the Act of 1866 did not confer upon telegraph companies the right to enter upon private property without the consent of the owner, or grant any right of eminent domain, and that the bill should be dismissed.

The court, after stating the contention of the telegraph company, said: —

> "The railroad company denies this construction, and asserts that the act gives the consent of the Government to telegraph companies to construct lines through its public domain and over and along its military post roads, which are not the property of private corporations, and across navigable streams and waters. The act gives no right, the railroad company contends, to appropriate private property; but is an exercise by Congress of the national power over interstate commerce to secure telegraph companies from 'hostile state legislation or contracts violative of an announced public policy'. In other words, the contention of the railroad company is, that after the Act of 1866 was passed, it 'became impossible for the States, by any legislation, to exclude telegraph companies from the post roads'."

The court then referred to the Pensacola case, quoting at length from the opinion therein, and among other passages that portion which states that whenever the consent of the owner is obtained no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges, and that no question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made, and that the use of public property alone is granted.

Western Union Tel. Co. v. *Ann Arbor R. R. Co., supra,*

was fully discussed, and the court concluded that these two cases were conclusive on the question involved in the case before the court. The court approved the Massachusetts case, but held it entirely consistent with the Pensacola case and the Ann Arbor case.

In reference to the St. Louis case the court said: —

> "It is manifest that to hold there can be no entry upon property without payment of compensation, is not to decide that such entry can be made upon tender of compensation.
>
> "Certainly, as to private property or rights, the non-consent of the owner is a factor to be dealt with."

The complainant having argued that by the charters, under which the several railroad companies operated by the defendant were organized, they were expressly created public highways, and that they, therefore, became highways in the full sense of that term, the court said: —

> "Nor does the statute of New Jersey make those rights of way public property so as to subject them to such occupation under the provisions of the Act of 1866."

It is submitted that the foregoing decision is to be confined in its scope strictly to the question at issue, namely, whether under the Act of 1866 a telegraph company has a right to enter upon a railroad right of way and erect and maintain thereon its telegraph line, without the consent of the owner, provided proper compensation is paid. The court held that this could not be done.

It is to be observed that the telegraph company had gone upon the railroad company's right of way under a contract by which the telegraph company expressly agreed to remove its line on the termination of the contract, and the decision of the court was that in such a case the railroad company could not be prevented from removing, or

causing to be removed, the telegraph company's line. The case does not even decide that in the absence of such an agreement a railroad company could remove a telegraph line which had once been erected upon the railroad's right of way with the consent of the railroad company. In fact, the court noticeably refrained from deciding that point, as appears from its discussion of the cases of *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.* and *St. Paul, M. & M. Railroad Company* v. *Western Union Telegraph Company,* on page 572 of the opinion. Much less does the court deny, on the contrary there is in the opinion a clear implication that, so far as public highways are concerned, if there were no difficulty by reason of the consent of the private owners of the fee in the highways not having been obtained, a telegraph company would have the right, under the Statute of 1866, to erect and maintain its lines in such highways.

In *Western Union Tel. Co.* v. *Richmond*, 178 Fed. 310 (C. C. E. D. Va. 1909),

the telegraph company brought a bill to enjoin the enforcement of a city ordinance which provided that the city engineer should determine the size, number and other particulars of erecting poles; gave the committee on streets power to require the telegraph company to permit the wires of other companies to be strung on its poles upon terms to be agreed upon between the parties, with a provision for arbitration in case of failure to agree; gave the city the right to put its own municipal wires on the company's poles, subjected the company's wires to the inspection of certain officials of the fire department for the safety of insulations, etc.; provided a fine for each day's failure to obey an order of these officials; and provided for the removal of the poles and wires from a certain district and the substitution of underground conduits for the overhead system under the supervision of a committee, with a fine

for each week's failure to remove the overhead system within a designated period. The company having failed within the designated period to remove its poles and wires from the prescribed district and put them underground, the city threatened to impose and collect the penalties provided by the ordinance, in order to compel the company to do so.

The prayer of the bill was that the city be restrained from enforcing the provisions of any of the sections of the ordinance, and that the same might be declared to be unreasonable and illegal.

The bill was dismised. The court at page 319 said:—

> "That the complainant under the Act of Congress of July 24, 1866, was entitled to use the streets and alleys of the city of Richmond for purposes connected with its telegraphic system is now so well established that the citation of authorities to sustain it will not be indulged in. That it had this right independent of any action by the city of Richmond, and without proceeding under the provisions of any legislation by the State of Virginia is I think without question. To hold that the companies mentioned in said Act of Congress are required to obtain the consent of the States and municipalities through which they pass before they are entitled to so use the post roads of the United States is to admit the power of an authority other than the United States to control them, and indirectly, at least, to concede to such other authority the right to regulate interstate commerce. The object sought to be obtained, the benefits intended to be secured to the Government of the United States, through the regulation of the business mentioned, and the facilities for communication between its departments in distant sections of the nation, would be jeopardized if not destroyed by the antagonistic

> interests likely to be found in different localities, if the officials thereof possessed the power to determine when and how the right granted by the Federal Government should become operative. Such companies, under the legislation of the Congress, have the right to use the post roads of the United States in conducting their business; but such use is subject to the police power of the localities where they so operate, which, properly exercised by State and municipal authority, must be respected by complainant and by all companies similarly situated."

The court then considered the provisions of the city ordinance and held that they were a reasonable exercise of the police power.

The company appealed to this Court and the decision of the Circuit Court was affirmed.

224 U. S. 160.

Mr. Justice Holmes, delivering the opinion of the court, at page 168 said: —

> "The appellant says that it has the right to occupy the streets of Richmond under the act of Congress, and therefore, although subject to reasonable regulation, it cannot be subjected to a discretion guided by no rules. Neither branch of this proposition, as applied to this case, commands our assent. To begin with the end, while it is true that rules are not laid down in terms, they are implied so far as there need to be any."

The court then further considered this branch of the case, concluding with the statement that the ordinance was not unreasonable as a ground of arbitrary power.

The court then continued: —

> "In view of what we have said and the appellant's admission that it is subject to reasonable regula-

tion it would be unnecessary to consider its rights under the act of Congress but for some further complaint that the appellant's property is taken without due process of law. That complaint opens the question what property the appellant has. The Act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. . . . It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. . . . It has been held to prevent a State from stopping the operation of lines within the act by injunction for failure to pay taxes. . . . But except in this negative sense the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the Statute and of its carrying on of commerce among the States, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners or as against the city or State *where it owns the land.* [Italics ours.] . . . When the appellant without the right to exercise the power of eminent domain desires to occupy land belonging to others, *prima facie* it must submit to their terms. We assume, as we have said, that the city has some interest in the streets that is affected by the presence or by the establishment of conduits or poles. If it demands, as a condition of its assent, as it does by § 6, that positions shall be reserved upon the poles for the city and by § 28 that provision shall be made for thirty per cent increase and that the city's wires shall be carried free of charge, one duct being reserved for them, it is within its rights. *Even assuming, as seems to be implied by*

some of the language in St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 104, 105; Western Union Telegraph Co. v. Attorney General of Massachusetts, 125 U. S. 530, that in consequence of the Act of Congress, the city is restricted to reasonable demands, the foregoing requirements do not seem to us unreasonable in view of the position of the parties." (Italics ours.)

It is to be observed that the city in this case made no attempt absolutely to exclude the telegraph company's lines from its streets. The ordinance itself provided that none of its requirements should in any manner interfere with or destroy the privilege of telegraph companies under the Act of Congress of July 24, 1866. The actual point decided was that the regulations contained in the ordinance were reasonable. This Court expressed no dissent from the view of the Circuit Court as to the plaintiff's rights under the Act, which it would naturally have done if it had dissented from those views. The court said that the statute gave the company no right to use the soil of the streets, even though post roads, as against private owners. It also said that the statute gave the company no right to use the soil of the streets as against the city or State, "where it owns the land", clearly implying it is submitted that when the city or State does not own the land, the statute does give such a right. While it was not necessary for the court to decide, and while it did not in fact decide, that the city was restricted to reasonable demands, it recognized that the proposition "seemed to be implied" in the St. Louis case and the Massachusetts case.

It is established law that while a municipality may charge a telegraph company which has accepted the provisions of the Act of Congress for municipal inspection, supervision and regulation, such charge must not exceed the reasonable expense of such inspection, supervision

and regulation; that if it does, the ordinance imposing it will be invalid; and that the question of reasonableness is reviewable in the courts.

W. U. Tel. Co. v. *New Hope*, 187 U. S. 419.
Atlantic & Pacific Tel. Co. v. *Philadelphia*, 190 U. S. 160.
Postal Telegraph Cable Co. v. *New Hope*, 192 U. S. 55.
Postal Telegraph Cable Co. v. *Taylor*, 192 U. S. 64.
Philadelphia v. *W. U. Tel. Co.*, 40 Fed. 615 (C. C. E. D. Pa. 1889).
Philadelphia v. *W. U. Tel. Co.*, 81 Fed. 948 (C. C. E. D. Pa. 1897).
S. C., 82 Fed. 797.
Philadelphia v. *W. U. Tel. Co.*, 89 Fed. 454 (C. C. A. 3d Cir. 1898).
Philadelphia v. *Atlantic & Pacific Tel. Co.*, 102 Fed. 254 (C. C. A. 3d Cir. 1900).
Philadelphia v. *Atlantic & Pacific Tel. Co.*, 109 Fed. 55 (C. C. E. D. Pa. 1901).
Nashville v. *Cumberland Tel. & Tel. Co.*, 145 Fed. Fed. 607 (C. C. A. 6th Cir. 1906).
Memphis v. *Postal Telegraph Cable Co.*, 139 Fed. 707 (C. C. W. D. Tenn. 1905).
S. C. on appeal, 145 Fed. 602 (C. C. A. 6th Cir. 1906).

The rule established by these cases is not reconcilable with the view that, notwithstanding the Federal Act, a telegraph company that has accepted its provisions cannot occupy the public highways without the consent of the State and municipalities, for, if such consent may be withheld altogether, it may be given on such conditions as the State or municipality chose to impose, including a money charge of any amount.

In *Western Union Telegraph Co.* v. *American Union Telegraph Co.*, Federal Cases No. 17,444,

the Circuit Court for the District of Indiana said that the railroad may have violated its contract with the plaintiff in permitting the defendant to go on the railroad's right of way, but held that this procedure could not be enjoined without "putting it in the power of railway companies operating post roads of the United States, by private agreement with a telegraph company, to defeat the purposes of the Act of 1866 . . . which was to make the erection of telegraph lines on the post roads of the United States (the consent of the owners of the right of way being obtained, or such right of way being condemned for telegraph purposes and compensation made therefor), free, even against hostile State legislation, to all corporations submitting to the conditions imposed by Congress. If, in such cases, State legislation cannot prevent the occupancy of post roads for telegraph purposes, by such corporations as are willing to avail themselves of the Act of Congress, much less could such results be rightfully obtained through private contracts of corporations."

In *Western Union Telegraph Co.* v. *The Mayor*, 38 Fed. 552 (C. C. S. D. N. Y. 1889),

it was sought to enjoin the City of New York from enforcing the provisions of a statute requiring poles and wires to be removed from the streets and elevated railway structures and to be put in conduits underground. The relief was denied as to the streets, but granted as to elevated railway structures. The court held that telegraph companies that have accepted the provisions of the Act of July 24, 1866, become, as to Government business, agencies of the general government; that all the streets of the city were post roads; that the elevated railroads were post roads; that a telegraph company was an instru-

ment of commerce; that its business was commerce itself; that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate commerce and that this power resided exclusively in Congress; that the complainant was protected by the national authority against any encroachment under State authority upon the rights and immunities expressly granted to it by the Act of Congress, or which it enjoyed in its dual capacity as an agent of the general government and an instrument of interstate and foreign commerce; that nevertheless persons and corporations enjoying grants and privileges from the United States, exercising Federal agencies and engaged in interstate commerce, are subject to a reasonable exercise of the police power, provided it does not unreasonably abridge or burden privileges and immunities derived from the Federal Government; that the regulation involved in the statute of New York did not impair the privilege granted to the complainant and was a legitimate exercise of the police power so far as the streets were concerned.

The court at page 558 said that the meaning of Congress was "to grant an easement that would afford telegraph companies all necessary facilities, and which to that extent should be beyond the reach of hostile legislation by the States", but held that the grant was not invaded by requiring the poles and wires to be removed from the streets and put underground.

Referring to the elevated roads, the court at page 560 said:—

> "That railway is an independent post road of the United States, in legal contemplation, carved out of the streets upon which its structures are erected; and State legislation, under whatever power it may be classified, is impotent to destroy the privilege given by the Act of Congress. The power to remove

the wires altogether from these structures, and to refuse to permit them to be kept there under any circumstances, is not regulation, but is equivalent to a complete denial of the privilege."

In *Ex parte Conway*, 48 Fed. 77 (C. C. S. C. 1891),

an employee of the Postal Telegraph-Cable Company was on habeas corpus freed from arrest on the charge that while he was engaged in constructing a telegraph line on the old State road between Charleston and Savannah he was obstructing a public road. The court proceeded on the ground that the company having accepted the provisions of the Act of July 24, 1866, and the road being a post road, the petitioner was acting under and by virtue of the laws of the United States.

In *Philadelphia* v. *W. U. Tel. Co.*, 40 Fed. 615 (C. C. E. D. Pa. 1889),

the court said that the city could not tax the company or exclude it from the city, but could subject it to proper regulations and supervision, with a view to the protection of persons and property.

In *Postal Telegraph-Cable Co.* v. *So. Ry. Co.*, 89 Fed. 190 (C. C. W. D. N. C. 1898),

which was a petition to condemn a right of way, the court said: —

"There is no doubt that any telegraph company incorporated by any State of the Union has the right to construct and maintain lines of telegraph along any railroad or other public highway in North Carolina, provided that they be so constructed as not to obstruct or hinder the usual travel thereon. . . . This same right to construct its lines along the right of way of post roads of the United States is given under the Act of Congress of 1866 to all telegraph companies accepting the provisions of that act."

In *Mich. Tel. Co.* v. *Charlotte,* 93 Fed. 11 (C. C. W. D. Mich. 1899),

it was held that an ordinance of the City of Charlotte requiring the complainant to remove its poles and wires from Main Street to an alley running parallel therewith was valid. The court assumed that the complainant was entitled to the benefits of the Act of July 24, 1866, but held that the statute was permissive only and was subject to the exercise by the city of the police power for the safety, health and convenience of the public. The court held, however, that the local authority could not arbitrarily interfere with the rights and privileges granted by the Act of Congress and under the guise of its conceded authority enact legislation which is really designed to accomplish some ulterior purpose beyond the scope of its legitimate power; and that while it had the power to compel the discontinuance of the line on Main Street under the circumstances, it could not do so without providing another practicable location.

In *Wichita* v. *Old Colony Trust Co.,* 132 Fed. 641 (C. C. A. 8th Cir. 1904),

it was held, affirming the decision of the Circuit Court (123 Fed. 762), that a statute of Kansas giving cities control over their streets did not impliedly repeal an earlier statute giving telegraph and telephone companies a right to use the highways of the State and give the cities the right of complete exclusion. The court said that if the later statute were held to repeal the earlier and give the right of complete exclusion, it would run counter of the Act of Congress of July 24, 1866, and would be void as to telegraph companies. The court assumed as a matter of common knowledge that the streets were post roads; that the telegraph companies had accepted the provisions of the Act of Congress, and at page 649 said: —

"It is therefore manifest that telegraph companies have at all times since the passage of the municipal charter act in Kansas been entitled, under this federal statute, to occupy the streets of cities of the first class in that state. Their 'right of way' there has not been dependent upon municipal consent. Notwithstanding this fact of common knowledge, the legislature of the state of Kansas has kept in force the statute which, it is urged by defendant, vests municipal authorities with power to grant and impliedly to refuse to grant such right of way. This statute cannot be construed as we are asked to construe it without rendering it void. If we adopt the construction that it is intended simply to vest in the local authorities police power over the subject, the act then becomes harmonious not only with other statutes of Kansas, but with this federal enactment."

In *Gans* v. *Ohio Postal Telegraph Cable Co.*, 140 Fed. 692 (C. C. A. 6th Cir. 1905),

the court, reversing the decision of the Circuit Court (137 Fed. 947, C. C. N. D. O. W. D. 1905) refused to enjoin the Board of County Commissioners from compelling the telegraph company to remove its line from the macadamized part of the Maumee Pike, but it appeared that they had provided the company with another location on the road, and the court fully recognized the rights of the company under the Act of Congress of July 24, 1866.

In *Mackay Tel. & Cable Co.* v. *Texarkana*, 199 Fed. 347 (D. C. W. D. Ark. Texarkana Div. 1912),

the company sought by bill in equity to enjoin the city from interfering with the construction by plaintiff of a telegraph line along the streets and alleys of the city. The plaintiff had applied to the mayor and city council

for leave to enter the city with its poles, wires, etc., tendering at the same time an ordinance, which, however, was never passed. On May 6, 1912, an ordinance was passed to become operative when accepted by the company. As the ordinance required underground construction in a larger section of the city than the company was willing to agree to, it refused to accept the ordinance. It was willing to put in some underground construction, but not as much as the city demanded. The company then proposed to put in its lines without any ordinance and brought this bill to prevent the city from interfering. The question came up on an application for a temporary injunction before defendant had answered. Affidavits were filed on both sides on the question as to whether underground construction was reasonably required in the disputed territory. The court held if a temporary injunction issued the plaintiff would get the whole relief sought by the bill in advance of a trial on the merits, and so denied the application. In the course of its opinion, however, the court referred to the Acts of 1866 and 1884 and said: —

> "Under those Acts of Congress, plaintiff is legally entitled to the use of the streets and alleys of Texarkana for the construction of its line." (Citing *St. Louis* v. *W. U. Tel. Co.*, 148 U. S. 92.) "The city may impose, under its police power, reasonable requirements on the company as to the manner of construction and maintenance of its line." (Citing *W. U. Tel. Co.* v. *Richmond*, 178 Fed. 310, and *W. U. Tel. Co.* v. *Richmond*, 224 U. S. 160.) "It does not lie exclusively within the power of either the company or the city to determine what is a reasonable requirement. The inquiry must be open in the courts, and must depend largely on the actual state of affairs in

the city." (Citing *St. Louis* v. *W. U. Tel. Co.*, 148 U. S. 105.)

In *Postal Telegraph-Cable Co.* v. *Chicopee*, 207 Mass. 341,

the court held that an injunction was properly refused which sought to enjoin the City of Chicopee from maintaining its electric light and fire alarm wires on the complainant's poles. But the court said that the line ran through public highways which were post roads and that "the plaintiff's predecessor in title" (a telegraph company)

> "had a right to construct and maintain such a line, and the plaintiff has a right to maintain it along public highways, under the U. S. Rev. Sts., § 5263. This right also is reaffirmed and extended to other classes of corporations by the R. L. c. 122, § 1. But it is subject to the right of cities and towns to make any reasonable local regulations in regard to the exercise of it. R. L. c. 25, § 54; c. 26, §§ 2, 6. These regulations, under the constitution of the United States, must be such as do not interfere with or regulate directly interstate commerce. These propositions are all well established by decisions of the Supreme Court of the United States."

In the case of

W. U. Tel. Co. v. *Superior Court*, 15 Cal. App. 679, the court said (p. 688):—

> "From the principles as thus affirmed, these incontrovertible propositions flow: 1. That telegraph corporations that have accepted the restrictions and obligations prescribed as to such corporations by Congress are not, primarily, beholden to any state for their right to transact a telegraph business therein;

that the sole source of their authority to enter any of the states or territories of the United States, where there are military and post roads and government waterways for the purpose of doing business therein is in the acts of the federal Congress. 2. That no State has the power, under the indicated circumstances, to exclude such corporations from the right or privilege of carrying on the business for which they are formed within its borders; that, while the State may impose upon such corporation, as it may upon all corporations of whatever kind or nature, organized and existing under the laws of another State, reasonable regulations, and to that end prescribe and require certain reasonable prerequisites to the exercise of the authority conferred on them by Congress to do business in such state, yet no state will be permitted, whether under the guise of regulation or otherwise, to enact any legislation the effect of which would or might, practically, be to prevent them from doing business in such state, or in effect result in an attempt on the part of such state to regulate commercial intercourse between its citizens and those of other states, or to control the transmission of all telegraphic correspondence within its own jurisdiction."

Under the Post Road Act of Congress a telegraph company cannot be prevented by a State or municipality from constructing its lines on the highways, and a lineman of such a company cannot be convicted criminally of obstructing the highway. Accordingly where a municipality orders the poles to be removed on account of street improvements, it must at the same time give new locations.

Carver v. *State*, 74 S. E. Rep. 556 (Ga.).

In the case of

Western Union Tel. Co. v. *Lakin*, 53 Wash. 326,

involving taxes, the court said: —

> "The company possessed under its federal franchise the right to do business upon all the roads and highways in the County of Pierce, whether within or without incorporated cities and towns. This right could not be denied. The power of the city was limited to its right to regulate the use of the privilege granted by Congress. It might provide that poles and wires should be carried over certain streets; that the wires should be carried on poles or buried in the ground; that travel should not be unreasonably obstructed, and that poles should be of certain height, and other like incidents. Beyond this it had no power to go. The ordinance relied upon did not grant a franchise."

The effect of the Act of 1866 as interpreted by these decisions is to authorize the use of public highways by telegraph companies which have accepted the provisions of the Act.

Of course the poles and wires must not obstruct travel. But in this case there is no pretence of such obstruction.

Moreover, telegraph companies, in their use of the streets, remain, notwithstanding the Act of Congress, subject to the police power of the States, and the complainant does not dispute the validity of State regulations governing such use, even to the extent of requiring the telegraph companies to apply for a permit. But the State cannot push its regulation to the point of exclusion. Against absolute exclusion the Act of Congress is a complete protection.

A careful consideration of the whole subject makes it clear that the Act must at least be given this effect.

When land is taken for a public highway, ordinarily only an easement is taken. The fee remains in the abutters, subject to the right of the public to use the land for a street. In most jurisdictions the easement does not include the right to use the street for telegraph lines. In Massachusetts the easement does include such right.

Pierce v. *Drew,* 136 Mass. 75.

In order to make use of a street for a telegraph line, two parties must, in the absence of Federal action, be reckoned with, the State and the owner of the fee. In Massachusetts the latter is eliminated; but in jurisdictions where the Massachusetts doctrine does not prevail the owner of the fee must be disposed of either by obtaining his consent, or by taking his rights by the exercise of the power of eminent domain, which power telegraph companies have in some States, but not in others.

As the Act of 1866 does not confer on telegraph companies that have accepted its provisions any power of eminent domain, it is helpless to afford any assistance to them where the owner of the fee has not been eliminated in one or other of the above ways. Whatever rights in streets it guarantees are confined to cases where the owner of the fee is eliminated and only the State, or what is the same thing, its municipalities, remain to be dealt with. Clearly in such cases the State has the right to give telegraph companies the authority to use its streets. The Federal Government could not say to a State "You shall not allow telegraph companies to use your streets." When a State has granted such a right to a telegraph company, it has all the authority it needs to erect and maintain its lines in the streets of the State. As the Federal Government could not prevent this, to withhold its permission would be of no avail and to extend its permission would be superfluous. Obviously, therefore,

the Act of 1866 was not intended to deal with such a situation.

If, however, a State, the owner of the fee being out of the way, should decline to permit the use of its streets by telegraph companies, then there would be occasion for the Congress to declare, under its authority to regulate interstate and foreign commerce and under its authority to enact postal laws, that the post roads of the United States should under proper safeguards be free to telegraph companies. This, the complainant contends, was precisely the intent and effect of the Act of 1866. If this is not so, it is difficult to see what Congress did intend by the Act or what possible effect it could have.

It may be suggested that the Pensacola case is an instance of what the Act could effect, apart from the above situation. In that case the Supreme Court held invalid a law of Florida attempting to give a certain telegraph company exclusive rights in one of the counties of the State. But the decision would have been just the same had the Act of 1866 never been passed. A State cannot exclude a corporation from doing business within its borders if the business is interstate commerce.

Paul v. *Virginia*, 8 Wall.
Pensacola Tel. Co. v. *W. U. Tel. Co.*, 96 U. S. 1.
Pembina etc. Mining Co. v. *Pennsylvania*, 125 U. S. 181.
Horn Silver Mining Co. v. *New York*, 143 U. S. 305.
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, 33–35.

The result of the Florida statute would have been to exclude all telegraph companies but one from doing any business whatever within the designated county, and as against telegraph companies doing an interstate business would have been bad on the above principle.

Another suggested answer to the question "What could be the effect of the Act of 1866?" is that it prevents railroads which are post roads from granting exclusive privileges on their right of way to particular telegraph companies, as in the Union Pacific case.

But here again the Act was not needed. Contracts for such exclusive privileges would be void as being in restraint of trade and against public policy, in the absence of any such Act.

W. U. Tel. Co. v. *B. S. W. Ry. Co.*, 11 Fed. Rep. 1.
W. U. Tel. Co. v. *B. & O. Tel. Co.*, 19 Fed. Rep. 660.
B. & O. Tel. Co. v. *W. U. Tel. Co.*, 24 Fed. Rep. 319.

Of course it is not unusual for a legislative body to enact into a statute a previously existent principle of the unwritten law. But it is to be remembered in connection with this statute that no telegraph company can make use of its benefits without making extreme concessions to the Government, *i. e.*, submitting to have the Postmaster General fix rates for Government business and consenting to have its line taken over by the Government at the latter's option. Surely Congress and the telegraph companies, for whose benefit the Act was supposed to be passed, must have believed that it was conferring real and substantial privileges, else so extreme a consideration would not have been required. It is difficult to believe that telegraph companies, practically all of which have accepted the provisions of the Act, would have done so and thereby made such great concessions, when they really got nothing in return — the Act merely declaring existing principles of law; one of which at least, namely, that forbidding contracts for exclusive privileges on railroads, the telegraph companies would have preferred to see abolished rather than reaffirmed, if the frequency with which they tried to make such contracts be any criterion.

It is fair to conclude that, since so much was exacted of companies that accepted the Act, the companies expected and Congress intended to grant substantial privileges. The only conceivable privilege is protection against exclusion from the public highways.

II.

THE APPELLEE HAS COMPLIED WITH ALL REASONABLE REGULATIONS OF THE STATE OF MASSACHUSETTS AND THE TOWN OF ESSEX RELATING TO THE OCCUPATION BY ITS LINE OF TELEGRAPH OF THE STREETS OF THE TOWN.

Assuming, as has already been shown, that under the Acts of Congress of July 24, 1866, and March 1, 1884, the appellee has a right to maintain its line in the streets of the town, it is nevertheless argued by the appellant that the appellee is not entitled to the aid of a court of equity, State or Federal, to prevent the removal of its line, unless it has complied with reasonable State and town regulations relating to the matter.

Conceding this to be so, the appellee contends that the evidence shows that it has done all it possibly could to comply.

It is not necessary to determine for present purposes whether the Massachusetts Statutes authorized the selectmen of Essex, if they saw fit, to refuse the appellee any location even although one could be given without incommoding the public use of the streets. If such is the effect of the statutes they would to that extent at least be invalid as being in contravention of the Acts of Congress, and the failure or refusal of the selectmen to give the appellee a location on the strength of such statutes would equally be in derogation of the appellee's rights, and it would not be required to acquiesce in such action on the part of the selectmen.

On the other hand, whether the Massachusetts Statutes authorize such action by the selectmen or not, in either event the appellee should comply with any other reasonable regulations applicable to the situation.

What regulations, then, were there, either by the State, the town, or the selectmen, to be observed by the appellee? Section 49 of chapter 27 of the Public Statutes (Record, p. 25) and Section 56 of chapter 25 of the Revised Laws (Record, p. 26) empowering selectmen to authorize citizens of the Commonwealth to establish and maintain in their towns poles, etc., for telegraphic communication, and Section 54 of chapter 25 of the Revised Laws (printed in full on page 22 of this brief) enabling selectmen to establish reasonable regulations for the erection and maintenance of all lines for the transmission of intelligence by telegraph by every person having authority to place poles, etc., for any purpose in or under public ways or places, may be dismissed from consideration, as the selectmen, so far as the record goes, do not appear to have taken any action whatsoever under either of these statutes. As regards Section 15 of chapter 109 of the Public Statutes (Record, p. 25) and Section 26 of chapter 122 of the Revised Laws (Record, p. 26), providing that no enjoyment for any length of time of the privileges of having or maintaining telegraph posts, etc., in, upon, over, or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easement or raise any presumption of a grant thereof, it is to be observed that the situation in the present case apparently brings it within the principle of the line of cases which hold that the Federal courts will not sustain an action of ejectment by a property owner against a telegraph company where the property owner has stood by and delayed action until after the telegraph line has been completed, but that the property owner's remedy is for

damages only. (See cases on pages 3885 and 3886 of the seventh edition of Cook on Corporations.)

The underlying principle of these decisions is that the telegraph line, being a quasi-public property operated to give service to the public and to the United States, under the post-road Act of Congress, will not be treated the same as a private tresspasser, public interests being involved and the continuity of telegraph service for the public being necessary. In the same way it was held in

> *Union Pacific Railroad Co.* v. *Greeley,* 189 Fed. 1 (C. C. of Appeals, 8th C., 1911),

that by acquiescence a railroad company may be barred from claiming that telegraph, railroad and other public service corporations which have used for many years and are using a portion of the former's right of way are doing so without legal right. In view of the foregoing principles, it may be questioned whether in spite of Public Statutes, chapter 109, Section 15, and Revised Laws, chapter 122, Section 26, the erection and maintenance by the appellee of its line without objection on the part of the town, and the fact that the line has been in its present lacation for twenty years, the town would not now be barred from excluding the appellee's line from the streets of the town; but, however that may be, and even if it be assumed that the erection of its line by the appellee without objection on the part of the town and its long occupation of the streets of the town give the appellee no additional rights, still the result would not be effected, because the appellee has a right to maintain its line in the streets of the town independently of the length of time during which it has maintained its line in the streets of the town, and of the fact that the line was built with the acquiescence of the town.

The really pertinent statutory provisions are Public

Statutes, chapter 109, Section 3; Revised Laws, chapter 122, Section 2, and Acts of 1903, chapter 237. (See Record, pp. 25, 26.) The first two of these laws are identical and provide that the selectmen of a town through which the lines of a company are to pass shall give the company a writing, specifying where the posts may be located, the kind of posts and the height at which and the places where the wires may run. The selectmen are also empowered, after giving the company opportunity to be heard, to direct any alteration, after the erection of the lines, in the location of the posts, etc., and in the height of the wires. Chapter 237 of the Acts of 1903 retained the first of these provisions unchanged, but in addition required any company desiring permission to erect poles, etc., upon any public way to petition the selectmen therefor. Provision was made for a public hearing on such petition and for notice of such hearing to the abutters on the streets proposed to be occupied. In regard to alteration of locations after the erection of the lines there was no change from the earlier statutes except that if the company petitioned for such alteration it might be made without hearing or notice. The appellant assumes that under the Public Statutes and under the Revised Laws it was incumbent upon the appellee to make written application to the selectmen for the writing provided for in the statutes. But there is absolutely nothing said in those statutes about an application, much less a written one. Let it be assumed, however, that a written application was required. The appellant roundly declares on page 11 of his brief that: "The reason why no location and specifications were ever granted to this plaintiff was that it never applied for any." In support of this amazing assertion, so far as concerns the proceedings in 1884, before the line was built, the appellant relies on the statement of Bartlett, son of the chairman of the selectmen in 1884, that his

father (who was dead when this suit was brought), told him that the company had no location (Record, p. 41); on the statement of Raymond, the town treasurer, that they had no right, no location there (Record, p. 42); on the statement of Sargent, the town clerk, that he had examined the records from 1861 to 1902 and had not been able to find any record of a location granted to the company, and that he had heard Bartlett, the deceased chairman, say that the company had no rights to go through the town (Record, p. 40); on the statement of Kimball, a selectman, that he had examined the town records from 1861 to the present time and did not find any permit for a location of poles in the streets to the company (Record, p. 43); on the statement of Cogswell, a selectman, that Bartlett, the deceased chairman, told him that the company never had a location in the town (Record, p. 45); on the statement of Bruch, appellee's treasurer, that the company's minute book contained no record of a location in 1884 (Record, p. 29); on the statement of Pillsbury, the appellee's superintendent, that there was no record of any such permit in the company's books (Record, p. 31); and on the statement of Hebb, the appellee's foreman, that the selectmen of 1902 claimed the company did not have any permit or franchise through there. (Record, p. 35.)

The appellant states the evidence as it appears in the record and not as it is quoted in the appellant's brief, and omits those portions of the evidence relating to a supposed mutilation of the town records upon which it does not rely.

It is so obvious, that it only needs to be stated, that all that the above witnesses and the deceased chairman Bartlett purported to say was that no writing or permit was ever given by the selectmen to the appellee. The appellee does not dispute this. Although it contended at the hearing that on the evidence such a writing or per-

mit had been given it, it accepts the finding of the District Court to the contrary. (Record, p. 23.) There is nothing, however, in the above-stated evidence that even remotely tends to show that such a writing or permit was not applied for. It is entirely consistent with the proposition that there was such an application and that the selectmen either refused or failed to give the writing or permit requested.

Bartlett, employed by the appellee in 1884, as constructor, assistant superintendent and right of way man, testified that he applied in writing for a right of way through the Town of Essex; that he last saw the application in the hands of Mr. Bartlett, the chairman of the selectmen, that it contained the location of streets through which the line was to pass; that it was presented in June or July, 1884, at Mr. Bartlett's house before any line was constructed. (Record, pp. 32, 33.)

This evidence stands absolutely uncontradicted on the record and is precisely confirmed by the appellant's own witness Cogswell, who testified on cross-examination that he inferred from what Mr. Bartlett, the former selectman, said, that what he meant to say was that they had definitely acted on a request and had refused it. (Record, p. 45.)

It is submitted that the evidence conclusively shows that the appellee before its line was built made a written application to the selectmen of Essex for a location in the streets of the town and that nevertheless no writing or permit was ever given by the selectmen to the appellee.

The appellant comments on the fact that the appellee never "sought to compel the Selectmen by mandamus or otherwise to perform the duty apparently imposed upon them by these statutes to grant a location on some terms, if application were made" and asserts that "if application had really been made and refused, it seems incredible

that the plaintiff would not have asserted its rights under these provisions". (Appellant's Brief, p. 12.)

It is by no means clear that the selectmen, as the appellant assumes, were bound under the State statute to grant a location on some terms. There are strong intimations from the State Supreme Court that the word "shall" should be construed as "may" and that the selectmen would have the right to decline to give a writing or permit, even though there were no incommoding of the public use of the streets.

Suburban L. & P. Co. v. *Boston,* 153 Mass. 200.

But, however this may be, it is to be noted that appellee's witness Bartlett testified that he was told by the chairman of the selectmen, with whom he lodged his application for a location, that it would be granted. There is no contradiction of this evidence in the record. The statements of the appellant's witnesses referred to on pages 11 to 13 of the appellant's brief assert nothing more than that the appellee had no right to erect or maintain its line in the town. This would, from the town's point of view, be true, by reason of the lack of any permit from the selectmen, even if the chairman had assured the appellee's right of way man that the application would be granted. There is no reason, therefore, to doubt his testimony that such assurance was given. It is the only assumption reasonably consistent with the undisputed facts that the appellee immediately after the application was presented proceeded to construct its lines and did so without objection from anyone, and that no objection arose for seven or eight years afterward. (Record, p. 13, par. 8, and pp. 19–20; Bartlett, p. 33; Atchison, p. 33; Hazelton, p. 39.) It is easy to see that the appellee built its line in the full belief that it had the consent of all persons interested and lawfully might build such line, and it would have been singular indeed if it had sought by man-

damus or otherwise to compel the selectmen to grant what the appellee already fully enjoyed.

But in any event, assuming that the chairman never gave the appellee or any of its employees any assurance that the application would be granted, and that the application was in fact definitely and formally refused; and assuming that the selectmen were bound by the State law to grant a location on some terms and could have been compelled to do so by mandamus or otherwise, the appellee was, when it built its line, in the position of having, by its written application, done all it could to comply with the State regulations and of therefore being entitled, both under the Federal and State statutes, to occupy the town's streets with its telegraph. The right of the appellant to compel the selectmen by the judicial progress of mandamus, if such right existed, to give the appellee what the State statutes entitled it to have, did not constitute a State regulation to be complied with before the appellee could resort to the rights conferred on it by the Acts of Congress. The act or the failure to act of the Board of Selectmen, whether for this purpose they be regarded as the special tribunal created by Section 3 of chapter 109 of the Public Statutes, or as officers of the town, or as individuals, denied to the appellee the right it possessed under the Acts of Congress. The fact that at the same time the appellee was denied rights conferred on it by State statutes, which rights the selectmen could have been compelled to effectuate by appropriate judicial procedure, could not deprive the appellee, which had done its best to comply with all regulations relating to the matter, from standing strictly on its Federal right. It was not incumbent upon the appellee to compel the selectmen to do their duty. It had a right to say to the selectmen: "Whether the State statutes confer any rights upon us, and, if so, whether you have done your duty in relation to our application, we are indifferent; we claim the right to

erect our lines in your streets, not under any State statutes, but under the Acts of Congress. We submit to your right as the agents of the State to regulate our use of your streets, and we have asked you to exercise this power of regulation and tell us how and where to erect our poles and string our lines. You have refused or at least failed to do so. There is nothing left to us to do, so far as our Federal rights are concerned, except to locate our line as best we can ourselves. We shall, after its erection, expect to be bound by any reasonable regulation, but as against absolute exclusion we shall stand on the rights given us by the Acts of Congress, and invoke the aid of the Federal courts if it is sought to interfere with those rights."

In other words, the appellee, after the selectmen had refused or failed to indicate where it might locate its lines, although the appellee had done what it could to observe the State regulations relating to the matter, had the right to make the Federal grant effective by locating its line as best it could itself.

Having built its line, the appellee did not abandon its efforts to obtain from the selectmen a location for its poles and wires.

McCaffrey, a witness for the appellee, testified that in 1895, when the electric railroad came through the town, he went over the route with Kimball, one of the selectmen, and had him point out where the witness might remove the poles that were in the way of the railway track; that Kimball pointed out where to set the poles; that he made no effort to get a permit for this relocation, but declined to move any poles until the selectmen would show him where he could put them; that he moved about half the poles at this time. (Record, p. 34.) Kimball did not deny this and said that he told McCaffrey to put the poles sideways. (Record, p. 42.) James, a selectman, testified that only a few poles were moved and that as to these

the selectmen did not designate where they were to be reset. (Record, p. 41.)

It is obvious that Public Statutes, chapter 109, Section 3, which was then in force, did not require any writing or permit for the resetting of these poles, and that here again the appellee, whether few or many poles were moved, and whether the selectmen did or did not point out the new locations, was trying its best to conform to the regulations and to the ideas of the selectmen.

Again in February, 1902, the line being in a very bad condition and very seriously in need of reconstruction (Record, Hebb, pp. 35, 36), the appellee presented to the selectmen an application in writing for a location in the streets then occupied by the line, the new poles to occupy the same positions as the old ones and any changes in locations to be made under the direction of the Board. (Record, Hebb, 35, 36; and see pp. 45, 46.) No definite action was taken on this application (Hebb, Record, p. 36; Cogswell, p. 44), although Cogswell testified that he considered the Board's failure to act on the petition as equivalent to a refusal. (Record, p. 45.)

By the time the appellee's bill of complaint was filed its line in the town was in an exceedingly unsafe and dangerous condition and in extreme need of relocation, resetting and repair. The details of the condition of the line are fully set forth on pages 12 and 13 of this brief and need not be repeated here.

Accordingly in June, 1905, the appellee by its foreman Ryan again presented to the selectmen an application for a location in the same terms as the application of 1902. (Record, p. 37; Defendant's Exhibit 1, p. 51.) The selectmen, after a public hearing of the abutters, the sense of the meeting being against the granting of the application, voted not to grant it and so notified appellee. (Cogswell, Record, p. 44; Kimball, p. 42; Ryan, pp. 37, 39; Complain-

ant's Exhibit 5, p. 46; Defendant's Exhibit F, p. 49; Defendant's Exhibit 6, p. 46.)

The record justifies, indeed compels, the conclusion of the District Court that " no failure on the plaintiff's part to do anything which the town has the right to require under the Statutes, State or Federal, or can otherwise reasonably require, as a condition of giving the specification, appears. The plaintiff has been, at least since 1905, constantly in the attitude of requesting the town to give the specification ". (Record, p. 23.) As a matter of fact the appellee has been constantly in this attitude since before the line was built in 1884.

Several suggestions of the appellant in this connection may here be noted:

1. The appellant criticizes the above quoted passage from the opinion of the District Court because the court speaks of the applications of the appellee, as made to the town, whereas the selectmen, in fulfilling the duties imposed on them by chapter 237 of the Acts of 1903 and its progenitors, act not for the town, or as its officers or agents, but as an independent public board, representing the Commonwealth directly. (Appellant's Brief, pp. 14, 15.) This is quite true. But it appears conclusively that all of the appellee's applications were made, as they should have been, to the selectmen and not to the town; Bartlett, it is true, says he applied to the town (Record, p. 33), but it plainly appears from the rest of his testimony that he addressed himself to the selectmen, had all his conferences with them, and that they treated and acted on his application, as made to them in the usual course, and not to the town. It is not strange that in characterizing his acts he should have failed to distinguish between the selectmen as agents of the town, and the selectmen as an independent board, acting under specific statute.

McCaffrey's dealings in 1895 were quite obviously with

the selectmen (Record, p. 34) and the petitions of 1902 and 1905 were formally and correctly addressed to "The Honorable Board of Selectmen of the Town of Essex". (Record, pp. 45, 51.)

The District Court had its attention on the attitude of the appellee in making its several applications, and not on the capacity in which the selectmen were acting in receiving the application. Substituting the word "selectmen" for the word "Town", the accuracy of the court's statement is undisputable. Nothing turns on the distinction so far as present purposes are concerned.

2. The appellant (Brief, p. 13) calls attention to the fact that the petitions of 1902 and 1905 (Record, Exhibit 3, pp. 45, 46; Exhibit 1, p. 51) were in the name not of the appellee, but of the New England Telegraph Company of New York, another existing company, and asserts that "it therefore clearly appears affirmatively that the only petitions ever received by the selectmen were not from the plaintiff, but from a different company; and, negatively, that the plaintiff company, which it agreed was the owner of the lines [p. 17] never made any application for the writing referred to in the statute, and was never refused such a writing". (Appellant's Brief, p. 14.) It was also contended at the hearing in the District Court that the applications of 1902 and 1905 should have asked for a relocation rather than a location.

A conclusive answer to the first of these contentions is that it cheerfully ignores the application of 1884.

Bartlett, a witness for the appellee, testified in regard to this application that he was employed by the company; that he attended to procuring rights of way for the company; that he applied to the Town of Essex for the right of way; that the line through the town was the line of the company. (Record, pp. 32, 33.)

The first sentence of the condensed statement of evi-

dence is: "The New England Telegraph Company is hereinafter called the company and the Town of Essex is hereinafter called the Town."

It cannot be disputed that the application of 1884 was made by the appellee and in its name. As to whether the applications of 1902 and 1905 should have asked for a relocation rather than a location, it would seem clear that, inasmuch as the appellee had never received any writing or permit from the selectmen, the proper thing to apply to them for was a location.

But entirely apart from these considerations, both contentions are technical to a degree and are entirely without merit.

The evidence makes it perfectly clear that the appellee is, and always has been, the owner of the line of telegraph through the streets of the town, that the people of the town thoroughly understood that the application was in behalf of the company that owned the line and that what was wanted was permission to locate under the supervision of the selectmen such of the poles as it was necessary to change in order to put the line in good condition.

It appears that the appellee is a part of a system of telegraph companies extending over the United States, known to the public as the Postal Telegraph Cable Company; that the lines in each State, however, are owned and operated by separate corporations organized under the laws of the State in which the lines are situated, each corporation being a distinct and independent company; that the various separate companies use the name Postal Telegraph Cable Company merely as a trade-name in its relations with the public, so as to get the advantage of the combined good-will of the association of separate companies. (Bruch, Record, p. 29.)

In accordance with this general scheme there were two separate corporations, the New England Telegraph Com-

pany, a Massachusetts corporation, and the New England Telegraph Company, a New York corporation. In neither case was the name of the State a part of the corporate name. The New York company has no lines or property in Massachusetts, does no business there and has nothing to do with the telegraph line in Essex (Record, Bruch, p. 28; Pillsbury, p. 30), and the Massachusetts company has no lines or property outside of Massachusetts (Record, Bruch, p. 28), and no relation with the New York company other than an arrangement for transferring interstate business and the common use of the name Postal Telegraph Cable Company in its relation with the public. While in its relation with the public the Massachusetts company uses the name Postal Telegraph Cable Company, in all formal transactions and in relation to the construction, operation and maintenance of its line and in its relations to the State, the Massachusetts company uses its charter name the New England Telegraph Company and describes itself as of Massachusetts. (Record, Bruch, p. 29.)

Pillsbury, who dictated the petitions, was not an officer of the New York company and had nothing to do with it. (Record, Pillsbury, p. 30.) The line passing through Essex was built, maintained and operated by the Massachusetts company (Record, Bruch, p. 28), and there was no reason for making these petitions in the name of the New York company. They referred to the line owned by the Massachusetts company (Record, Pillsbury, pp. 30, 32), were made in behalf of the Massachusetts company (Record, Pillsbury, p. 32), and the description "of New York" was a mere slip of the pen (Record, Bruch, p. 29); or an error or nomenclature (Record, Pillsbury, p. 30); or a clerical error (Record, Ryan, p. 37.)

The petitions themselves show that what was wanted was a designation of positions to be occupied by new poles needed for the line already running through Essex, the

new poles to occupy practically the positions occupied by the old poles, and the selectmen to have the direction of any changes that might be made in the positions. (Record, Exhibit 3, p. 45; Exhibit 1, p. 51.)

Ryan, the appellee's foreman, testified that at the hearing on June 30, 1905, which the selectmen gave on the petition of 1905, either the chairman of the Board of Selectmen or the attorney for the town asked him if the petitioner was a foreign corporation and what was meant by asking for a location, rather than a relocation; that the witness stated to the board and those present that the description of the petitioner and the use of the word location were clerical errors, and that he stated just what the petition asked for and requested to have it returned so that the clerical errors might be corrected. (Record, p. 37.) He further testified that he again asked leave to take the petition back to Superintendent Pillsbury to have the errors corrected. (Record, Ryan, p. 37.) Sargent, the town clerk, called by the town, remembered that Ryan had said at the hearing that these were errors. (Record, Sargent, p. 40.) Burnham, another of the defendant's witnesses, remembered Ryan's saying that the different names referred to the same company, that is, the one with the big poles and the one already there in the town, and did not understand that it was for a new line of poles. (Record, p. 42.) Selectman Kimball, called by the town, stated that Cogswell, the chairman at the meeting, explained who the petitioners were and referred to them as "the Cable Company going through the town", with the statement that he did not know the name, that they went under a variety of names, but that that was the line referred to, and made it clear that it was the same company that owned the line then there, and that what they wanted was a location for that same line. (Record, p. 43.) Cogswell himself testified that some one at the hearing asked what company was

petitioning, and that he read the name on the petition and said: "It is the company that has the large poles in the town." (Record, p. 45.) There is no dispute that "the company with the large poles" is the appellee.

The foregoing evidence makes it clear that the selectmen were in no way misled by the fact that the petitions of 1902 and 1905 were in the name of the New England Telegraph Company of New York, or by the fact that they asked for a location, but on the contrary thoroughly understood what was intended to be asked for and in whose behalf. It is also clear that it would not have made a particle of difference in the action of the selectmen if the petitions had been in the name of the New England Telegraph Company of Massachusetts and had asked for a relocation. When foreman Ryan asked to have the application returned he was told it was not necessary, and it was not returned. (Record, pp. 37, 38, 39.) Ryan asked the Board if they wished him to take the application back to Pillsbury and was told it did not matter, that no application would be considered. (Record, pp. 38, 39.) Selectman Kimball admitted that if the petition had been in the name of the Massachusetts company it would not have been granted; that at a conference held after the hearing in Pillsbury's office, at which representatives of the appellee and its counsel, Mr. Wardner, the selectmen and their counsel, Mr. Richardson, were present, he remembered Mr. Wardner's asking the selectmen whether it made any difference if the petition used that name and asked for a location, and the reply was that it did not make any difference; that the object of the town was to discover the right which any telegraph company had to use its streets, and if it had a right well and good, and if it did not have a right the town was not going to have any telegraph company there. (Record, p. 43.) This witness was asked on cross-examination whether he did

not meet Ryan shortly after the meeting of June 30 and say to Ryan that the form of the petition made no difference, that the fact that they asked for a location and applied in the name of the New York company was not of importance, but that the idea was to dispute the right of the telegraph company to be there, and that was why the petition was refused. The witness replied that he did not remember saying it made no difference; he may have said he wanted to raise the question of the right of the company to be there, whatever company it might be that owned those poles and wires. (Record, p. 44.) Ryan testified that at the conference in Pillsbury's office, Richardson, the town's counsel, told Pillsbury that they did not propose to have any of the appellee's poles in the town on any street if they could prevent it, and that Kimball said that there were no streets they wanted the company to use in the town; that the upshot of the conference was that the company could not set any poles in the town unless the court said so. (Record, pp. 37, 38.) Pillsbury testified that at the conference in his office Richardson stated to him that the town wanted the poles taken entirely out of the town, would not grant the company's petition and would prevent construction work, if necessary, by force. (Record, pp. 30, 31.) Ryan testified that he had several interviews with the different selectmen after the hearing on June 30, 1905, and prior to July 11, 1905, and asked the chairman if he had any objection to the company's going ahead and repairing the line as it stood, replacing the poles with new poles, and the chairman said that if the company made any attempt to do any work in the town the town would find a way to stop it, and that the witness took the chairman to mean that he would have the gang arrested. (Record, p. 37.)

The finding of the District Court upon this part of the case was as follows: "I find that their refusal to grant the

application was not upon the ground that it was applied for in the name of the New England Telegraph Company of New York instead of in the name of the plaintiff, but was a refusal, upon other grounds below appearing, to grant the plaintiff or any company connected with it, any location within the Town. At a subsequent conference between the Selectmen and representatives of the plaintiff, it was stated to the plaintiff, by or on behalf of the Selectmen, that they would not grant a location to any company, in any street of the Town, unless actually forced to give it, and that they desired to raise the question of the company's rights to be in the Town. Also that the Selectmen wanted the poles taken entirely out of the Town and would prevent construction work by force if necessary. The Selectmen or their Chairman were asked if there was objection to the repair of the line as it stood, merely replacing old poles with new ones. The reply was, that there was objection, and that any work of the company within the Town would be stopped."

3. The appellant contends that under Public Statutes, chapter 109, Section 3, Revised Laws, chapter 122, Section 2, and Acts of 1903, chapter 237, the selectmen of a town have no right to give the writing provided for in the statutes unless it is applied for and given before the erection of the proposed line; that as the appellee's line had already been constructed when it applied to the selectmen in this case the selectmen had no right to give the appellant the written specifications asked for as an original location; and that they had no right to give the specifications as a relocation because the right of the selectmen to relocate presupposes an existing valid location, which the appellee in this case did not have. (Appellant's Brief, p. 47.)

This contention cannot be supported:

a. The argument entirely ignores the unquestioned fact that, as pointed out on page 74 of this brief, the appellee did in 1884, before its line was built, apply in writing to the selectmen of the town for a writing specifying the location of its proposed line pursuant to Public Statutes, chapter 109, Section 3. The selectmen on any view of the statutes then had the right to give the appellant a location, but nevertheless refused or at any rate failed to do so.

b. Leaving out of consideration the application of 1884 and assuming that the appellant's construction of the Massachusetts Statutes is correct, then if the appellee derived no rights under the Acts of Congress there might be some force in the appellant's suggestion. But if as has been shown the appellee did have a right under the Acts of Congress to erect and maintain its line in the streets of the town, and if the appellee before availing itself of its Federal right as has been shown did do what it could to comply with State regulations and duly make application to the selectmen for a location and only availed itself of its Federal right to erect its line after its application proved fruitless, an entirely different situation is presented. If the State Statutes in such a case required the appellee before it could obtain specifications of location to take down its entire line and apply afresh, and if according to the State law the presence of the line in the streets of the town would be a nuisance and illegal unless this were done, then the State regulations in this respect were unreasonable and a plain infringement of the appellee's rights under the Acts of Congress.

c. Finally the appellee submits that the construction which the appellant seeks to put on the Massachusetts Statutes is not tenable. If such be the construction, it would follow that if a telegraph line had been lawfully

erected in the streets of a town in Massachusetts prior to the original enactment of the law, or if a telegraph company had a line on private land which was subsequently taken for a street, it could not obtain a permit from the selectmen unless it had first entirely removed its line. No doubt the law was framed with a view to what should be required of telegraph companies and the selectmen where it was proposed to erect a line of telegraph in the public streets, and the language of the statute is appropriate to this situation. But so extreme a construction as that contended for by the appellant is not required. It is probable that many lines of telegraph in Massachusetts have been erected in the streets without any permit having been issued by the selectmen of the town and without fault probably on the part of either the companies or the selectmen. To hold that in such cases the lines could not be legalized by the companies applying for and the selectmen giving the writing called for by the statutes would require a rigorous and technical construction of the statutes which should not commend itself to any court.

III.

THE SUIT IS PROPERLY BROUGHT AGAINST THE TOWN.

Attention has already been called to the appellant's contention that the selectmen in performing the functions imposed upon them by chapter 237 of the Acts of 1903, and its progenitors, act not for the town or as officers or agents of the town, but as an independent public board representing the Commonwealth directly. (Appellant's Brief, p. 15.)

This proposition is not disputed.

The appellant appears to assume that the action which the appellee seeks to enjoin would, if taken by the selectmen, have been in pursuance of the functions exercised

by them under the statute. (Appellant's Brief, pp. 46, 47 *et seq.*) This is an error. The appellee does not seek to enjoin the selectmen from refusing to grant its petition. What it does seek to enjoin is the removal of its line from the streets of the town.

The sole functions reposed in the selectmen by Public Statutes, chapter 109, Section 3, Revised Laws, chapter 122, Section 2, and Acts of 1903, chapter 237, were to determine first whether any location could be granted the appellee, without incommoding the public use of the streets, and, if it could, in the second place, where the poles should be set, and in the third place, after the erection of the line, when and what changes should be made. In regard to a telegraph line unlawfully in the streets, or for that matter in regard to any obstruction in the streets, they had as an independent board created by the above statutes no right or duty to take any action whatsoever. Having refused the appellee's petition their jurisdiction as such board was at an end.

Now, it is the law of Massachusetts that any structure within the limits of a highway, without legislative authority, whether incommoding public travel or not, is a nuisance punishable by indictment. (See cases cited on p. 22 appellant's brief.)

Hyde v. *Middlesex*, 2 Gray, 267.
Holbrook v. *McBride*, 4 Gray, 215, 220.
Gregory v. *Adams*, 14 Gray, 242, 246, 247.
Stoughton v. *Porter*, 13 Allen, 191.
Commonwealth v. *Blaisdell*, 107 Mass. 234.
Colburn v. *Kittredge*, 131 Mass. 470.
Allen v. *Boston*, 159 Mass. 324, 335.
Gifford v. *Westport*, 190 Mass. 323.
Com. v. *The Railroad*, 202 Mass. 394, 397.
Smith v. *Adams*, 206 Mass. 513, 514.

It is also the law in Massachusetts that it is the duty of a town to remove from a public street anything constituting a nuisance therein and that if the town fails to remove such nuisance it is liable to indictment.

Young v. *Yarmouth*, 9 Gray, 386, 389.
Com. v. *Boston*, 97 Mass. 555, 562.

The whole record makes it clear that for a considerable time, and especially since the refusal of the appellee's petitions of 1902 and 1905, the town has regarded the appellee's line as being within its streets without legislative authority, as consequently being unlawfully there, in fact constituting a nuisance, and this attitude is maintained before this Court. (Appellant's Brief, p. 7.)

If this was the belief of the town, it was its duty as a town under the laws of the Commonwealth to remove what it considered to be an unlawful structure in its streets, and since of course the town must act by its agents it would inevitably fall to the selectmen to exercise this town function and duty. The action of the selectmen in attempting to force the removal of the appellee's lines can be attributed to nothing else than to an attempt to fulfil this important town function. It would be unreasonable to regard them as having acted as individuals, for as individuals they would have no right to remove the appellee's lines unless they were individually inconvenienced in the use of the streets, which was not in fact the case, as it appears that there was no interference by the appellee's line with the ordinary travel upon the streets. Nor can they be treated as having acted as the special board created by the above-mentioned statutes, since as already shown they were in that capacity entirely without jurisdiction to act in the matter at all.

Clearly it cannot be necessary for the officers of a town before proceeding to remove an obstruction placed in its

streets to wait for a vote at town meeting authorizing such procedure as the appellant seems to contend. (Appellant's Brief, p. 36.) A telegraph line is no different in this respect from any other obstruction. To hold that the selectmen of a town before removing a telegraph line which they regarded as unlawfully in the streets must be armed with a prior vote of the inhabitants of the town at town meeting would involve the proposition that if a tent were erected over night in the middle of a highway the officers of the town could not remove it until a town meeting had been held and a vote to that effect passed.

It was not only the right but the duty of the selectmen if they believed that the appellee's line was unlawfully in the streets of the town to deal with it forthwith as they would with any other obstruction in the streets and it was not necessary for them to wait for any town vote upon the subject.

Nor is there any merit in the appellant's suggestions (Brief, p. 36) that the selectmen, acting in behalf of the town, would not be justified in resorting to any other method than a court proceeding to procure the removal of the appellee's line. The selectmen were justified in resorting to any method the law allowed to get rid of what they regarded as a nuisance in the streets, just as a private individual inconvenienced by an unlawful obstruction in a highway may abate it.

Brown v. *Perkins*, 12 Gray, 89, 101.

So a town by its officers may remove such an obstruction out of hand indeed, it is the town's duty so to do.

In *Young* v. *Yarmouth*, 9 Gray, 386,

an action to recover of a town for injuries caused by a telegraph post in a street, the court held that, apart from statute, if the post was an obstruction rendering the street

unsafe, it would be a defect for which the town might be liable. "It would be so", the court said, at page 389, "because such erection of posts would have been an unauthorized act, and the duty of the town of Yarmouth would have been to require their immediate removal."

See also —

Com. v. *Boston*, 97 Mass. 555, 562.

What the selectmen, acting for the town, may lawfully do, they may lawfully intimate, or announce or threaten that they will do.

The appellee's suggestion, therefore, that the town is not the proper defendant because the selectmen were acting ultra vires (Brief, p. 56) cannot be supported.

The selectmen, it is assumed, in their capacity as town officers, in good faith believed the telegraph line was not lawfully in the town's streets, and that therefore it was the town's duty, and their duty as the appropriate town agents, to remove the line. It was against this expected action of the town, through its selectmen, that the appellee, believing its line was lawfully in the streets by virtue of the Act of Congress, sought relief.

The appellant's remark that "it will hardly be contended that virtuti officii they [the selectmen] had authority from the town to commit assault and battery" is entirely beside the point. As concerns the removal of the appellee's line, which it was the chief object of this bill to prevent, if the selectmen had undertaken to remove appellee's line, no agent of the appellee would have resisted. There would have been no danger of assault and battery. What the appellee sought to prevent was the physical removal of its line by the town acting through its selectmen. As regards relocating, resetting, or repairing, if, as the town thought, the appellee's line was unlawfully in the streets, it would have the right to prevent the appellee

from relocating, resetting, or repairing, by such physical means as might be necessary to accomplish its end.

It is submitted that if the selectmen had done what they appeared to be about to do, their acts would not have been ultra vires, but would have been the act of the town, and that this bill was properly brought against the town.

IV.

THE RECORD SHOWS THAT THERE WAS OCCASION FOR THE INTERPOSITION OF A COURT OF EQUITY.

It was made perfectly evident to the appellee when the question of the error of name in the application and the use of the term "location" was under discussion, that it would be useless to have the petition corrected, presumably because it would not be granted in any form. (Record, Ryan, pp. 37, 38, 39.)

In fact, Selectman Kimball in substance so testified. (Record, p. 43.) This witness further testified that it was stated by the selectmen at the conference in Pillsbury's office that the object of the town was to discover the right which any telegraph company had to use its streets, and if it had a right well and good, and if it did not have a right the town was not going to have any telegraph company there. (Record, pp. 43, 44.)

Ryan testified that at the conference in Pillsbury's office the town's counsel said that they did not propose to have any poles of the company in the town on any street if they could prevent it, and that Selectman Kimball said that there were no streets that they wanted the company to use in the Town of Essex. That the upshot of the conference was that the company could not set any poles in the Town of Essex unless the court said so. (Record, pp. 37, 38.) Pillsbury testified that at the same conference the town's counsel stated to him that the town

wanted the poles taken entirely out of the town, would not grant the company's petition, and would prevent construction work if necessary by force. (Record, pp. 30, 31.) Ryan testified that after June 30, 1905, and before July 11, 1905, he asked the chairman of the selectmen if he had any objection to the company's going ahead and repairing the line as it stood, replacing the poles with new poles, and the chairman said that if the company made an attempt to do any work in the town, the town would find a way to stop it, and that the witness took the chairman to mean that he would have the gang arrested. (Record, p. 37.)

The defendant's answer admits that the town through its selectmen have notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatsoever within the limits of said town and that the selectmen of said town forbade the plaintiff from resetting its poles, from changing the location of its poles, from restringing its wires, or from doing business of any sort in said town, on the highways of said town, until first a franchise was obtained therefor in accordance with the laws of Massachusetts. (Record, p. 10.) By its cross-bill the appellant prayed that the plaintiff be ordered to forthwith take up its poles from said streets and that the plaintiff be restrained from using said poles and wires for its business purposes until it shall have first obtained a franchise from the Board of Selectmen as provided by the laws of Massachusetts. (Record, p. 14.)

The statement of the answer that the selectmen forbade the appellee from resetting its poles, etc., until first a franchise was obtained therefor according to the State law, and the prayer of the cross-bill that the appellee be enjoined from using its lines until it had obtained a franchise from the selectmen, and the contention on page 51

of the appellant's brief that the evidence shows no intent finally to refuse the appellee's application for a location, but only until the appellee, by removing its line, put itself in a position to invoke the jurisdiction of the selectmen, with an implication that then the application might be granted, seems almost ironical, in view of the fact that the record shows that there was not the slightest possibility of the selectmen giving the appellee a location under any conditions. (Record, Ryan, pp. 37, 38, 39; Kimball, pp. 43, 44; Pillsbury, pp. 30, 31.)

The District Court correctly found the facts to be as stated in the above quoted evidence, namely, that the selectmen would under no circumstances give the appellee a location. (See that part of the court's opinion quoted on pages 85 and 86 of this brief.)

To require the appellee to take up its line and apply for a location to a hostile board which had evinced a determination never to grant such a location would plainly be to exclude the appellee altogether.

The contention of the appellant on pages 44, 45 of its brief that the declarations of the selectmen cannot be considered and the cases cited by the appellant in support of the contention are entirely beside the mark. If it be conceded, as for the purposes of this argument it must be conceded, that the appellee, under the Act of Congress, had a right to occupy the streets of the town with its line and to have the aid of a court of equity to prevent the removal of that line by the town, it was clearly the appellee's right in order to invoke and obtain the injunctive remedy to show that the town was hostile and that removal was threatened by it. This could only be shown by the acts and declarations of the town's officers. It makes no difference to the appellee whether those acts and declarations were matters of record or not. What the appellee was concerned to prevent was removal. What the appellee

had to show to prevent removal was that there was danger of removal. The acts and declarations of the selectmen showed the existence of this danger. This was the sole purpose of the introduction of the evidence of these declarations and acts, and for this purpose the evidence was clearly admissible.

The suggestion of the appellant on page 56 of its brief that the selectmen had in mind simply the institution of legal proceedings cannot be sustained. The selectmen did threaten to prevent the appellee by force from doing anything in the way of relocating, resetting, or repairing. (See particularly the evidence of Pillsbury and Ryan, quoted above, which evidence is not contradicted.)

While the threat of force was more specifically directed against relocating, resetting and repairs than towards compelling the removal of the line altogether, still the record reflects a temper and disposition on the part of the selectmen and the townspeople generally that makes it apparent that an attempt on the part of the town to remove the line was imminent. The whole atmosphere of the case is pregnant with a determination on the part of the town to bring matters to an issue and precipitate the controversy by an attempt to remove the appellee's line from the streets.

In any event the appellant, whether justified by State law or not, threatened action which would deprive the appellee of a right conferred on it by the Act of Congress and the appellee was, and is, therefore, entitled to equitable relief by injunction on the same principle by which a person whose rights are in danger of being violated by the enforcement of an unconstitutional statute is entitled to have the enforcement of such statute as against him enjoined.

Dobbins v. *Los Angeles*, 195 U. S. 223.

V.

THE FINAL DECREE IS NOT TOO BROAD AND SHOULD BE AFFIRMED.

The appellant contends that the final decree should be modified by adding to it the proviso set forth on page 57 of the appellant's brief.

This is the first time that any such suggestion has been put forward in behalf of the town. The decree (Record, p. 18) is, so far as the injunction contained in it goes, substantially identical with the temporary injunction granted on September 5, 1905. (Record, p. 7.)

No motion was ever made by the town to modify the temporary injunction; it was not suggested at the hearing in behalf of the town that the temporary injunction was too broad; and when the District Court determined that the telegraph company had a right to maintain its lines in the streets of the town the town offered no objection to making the temporary injunction permanent on the ground that it was too broad.

The final decree so far as the injunction embodied in it is concerned may be divided into two parts. The first part enjoins the defendant from interfering in any manner whatsoever with the complainant's line of telegraph in the defendant town. The second part enjoins the defendant from interfering in any manner whatsoever with the location or relocation by the complainant on the roads and highways now occupied by its said line of telegraph in said defendant town, or with the resetting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, relocation, resetting, repairs or changes by the

complainant. The first part of the relief was sought by the appellee to prevent the threatened removal of its lines from the streets of the town, and the second part of the relief was sought by the appellee to enable it to make the changes in the line necessary to make the line safe and efficient. These changes as the evidence shows involved the location or relocation, whichever the proper term may be, of certain of the poles, the resetting of some of the poles and other repairs and changes necessary to put the line in a condition of safety and efficiency.

The final decree is to be construed in the light of the circumstances existing at the time it was made, and language which might apart from such circumstances seem too broad should receive the limitation required by the conditions under which and the purposes for which the relief is sought.

It was not the intention of the appellee when framing its prayer for relief, nor of the court in entering the final decree, to deprive the State of Massachusetts, or the Town of Essex or the selectmen of the town, acting as an independent board, of the right to make any reasonable regulation covering the maintainence and operation of the appellee's telegraph line in the Town of Essex. Nor is such regulation in the appellee's opinion excluded by the final decree as it stands, if it be properly construed in the light of the attending circumstances.

As concerns Section 2 of chapter 509 of the Acts of 1911, which is the present substitute of chapter 237 of the Acts of 1903 and of the earlier statutes, the final decree does not interfere with the exercise of any duty or right of regulation on the part of the selectmen under that statute, for the reason that the final decree runs against the Town of Essex and not against the selectmen, acting as a distinct and independent board. It is not believed that the final decree would interfere with the making of regu-

lations by the selectmen under Section 54 of chapter 25 of the Revised Laws, or with the enforcement of such regulations under Section 55 of said chapter, or with any regulation or requirement that might be made under Sections 16 to 23, inclusive, of chapter 122 of the Revised Laws, or with the enforcement thereof under Sections 18 and 19 of said chapter, or with the right of the town to maintain a bill in equity to compel the removal of the appellee's line, should it become a nuisance, in order to avoid liability under Section 18 of chapter 51 of the Revised Laws.

The concluding portion of the final decree, "from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, resetting, repairs or changes by the complainant", does not enlarge the scope of what precedes it, as it is to be presumed that it relates only to such persons or corporations as are within the control of the defendant town.

If, however, it should be the opinion of this Court that the final decree as framed is too broad, the appellee submits that in case the final decree is amended by the addition of the clause suggested on page 57 of the appellant's brief that there should be inserted in the fifth line of said clause after the word "the" and before the word "laws", the words "reasonable and valid".

VI.

The appeal should therefore be dismissed with costs.

G. PHILIP WARDNER,
Counsel for Appellee.